UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,

PLAINTIFF,

-VS- DOCKET NO. 1:16-CV-03088-ELR

STATE OF GEORGIA,

DEFENDANT.

TRANSCRIPT OF MOTIONS PROCEEDINGS
BEFORE THE HONORABLE ELEANOR L. ROSS
UNITED STATES DISTRICT JUDGE
APRIL 18, 2024

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

KELLY GARDNER WOMACK, ATTORNEY AT LAW
JESSICA POLANSKY, ATTORNEY AT LAW
ANDREA HAMILTON WATSON, ATTORNEY AT LAW
AILEEN BELL HUGHES, ATTORNEY AT LAW
FRANCES SUSAN COHEN, ATTORNEY AT LAW
ANDREA E. HAMILTON, ATTORNEY AT LAW
MATTHEW KENNETH GILLESPIE, ESQ.
CRYSTAL ADAMS, ATTORNEY AT LAW

ON BEHALF OF THE DEFENDANT:

JOSHUA BARRETT BELINFANTE, ESQ.
EDWARD BEDARD, ESQ.
ANNA NICOLE EDMONDSON, ATTORNEY AT LAW
DANIELLE MARIA HERNANDEZ, ATTORNEY AT LAW
MELANIE LEIGH JOHNSON, ATTORNEY AT LAW
JAVIER PICO-PRATS, ESQ.

ELIZABETH G. COHN, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
ATLANTA, GEORGIA

(ATLANTA, FULTON COUNTY, GEORGIA; APRIL 18, 2024, AT 10:01 A.M. IN OPEN COURT.)

THE COURT: THANK YOU, SIR.

THANK YOU. GOOD MORNING. BE SEATED.

I TRUST WE ARE ALL AWAKE NOW, HUH?

ALL RIGHT. I NOW CALL THE CASE OF UNITED STATES OF AMERICA AS PLAINTIFF VERSUS STATE OF GEORGIA AS DEFENDANT. THIS IS CIVIL ACTION 16-CV-3088. AND WE ARE HERE FOR SEVERAL MOTIONS, ORAL ARGUMENTS SPECIFICALLY ON PLAINTIFF UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT; DEFENDANT STATE OF GEORGIA'S MOTION FOR SUMMARY JUDGMENT; DEFENDANT'S MOTIONS TO EXCLUDE THE TESTIMONY OF PLAINTIFF'S EXPERT WITNESSES, DR. AMY MCCART, AND ALSO DR. ROBERT PUTNAM; PLAINTIFF'S MOTION TO EXCLUDE THE DECLARATION OF DANTE MCKAY; AND MOTION TO PARTIALLY EXCLUDE THE TESTIMONY OF DEFENDANT'S EXPERT WITNESS, DR. ANDREW WILEY.

I AM GOING TO HAVE THE ATTORNEYS WHO WILL BE PRESENTING TO ANNOUNCE YOURSELF FOR THE RECORD.

DID WE JUST DO AWAY WITH THE ZOOM ATTEMPTS?

THE COURTROOM DEPUTY: THEY ARE HERE. THEY CAN HEAR US.

THE COURT: OKAY. WILL ANYONE WHO IS PRESENT BY ZOOM NEED TO ANNOUNCE THEMSELVES? NO?

THE COURTROOM DEPUTY: THEY CAN, BECAUSE A FEW HAVE --

THE COURT: OKAY. I AM BEING TOLD NO.

ALL RIGHT. SO ON BEHALF OF THE PLAINTIFFS, IF YOU WOULD GO AHEAD AND ANNOUNCE YOUR APPEARANCE FOR THE RECORD.

MS. WOMACK: GOOD MORNING, YOUR HONOR. KELLY GARDNER WOMACK FOR THE UNITED STATES.

THE COURT: GOOD MORNING.

MS. POLANSKY: GOOD MORNING, YOUR HONOR. JESSICA POLANSKY FOR THE UNITED STATES.

THE COURT: GOOD MORNING TO YOU.

MS. WATSON: GOOD MORNING, YOUR HONOR. ANDREA HAMILTON WATSON FOR THE UNITED STATES.

THE COURT: YES, MA'AM. GOOD MORNING.

MS. COHEN: GOOD MORNING, YOUR HONOR. FRAN COHEN FOR THE UNITED STATES.

THE COURT: GOOD MORNING TO YOU.

MS. HUGHES: GOOD MORNING. AILEEN BELL HUGHES FOR THE UNITED STATES.

THE COURT: GOOD MORNING.

AND, LET'S SEE, JUST WHO ELSE IS AT COUNSEL TABLE, WHETHER OR NOT AN ATTORNEY.

MR. DENAULT: MICHAEL DENAULT.

THE COURT: ALL RIGHT. YOU GET TO ANNOUNCE YOURSELF, TOO. AND WHAT CAPACITY ARE YOU APPEARING, SIR?

MR. DENAULT: I'M JUST HERE AS THE TECH MAN.

THE COURT: NOT JUST. YOU ARE IMPORTANT. SO THANK

YOU FOR BEING HERE. THANK YOU SO MUCH.

AND WE'LL RESUME WITH THE ANNOUNCEMENTS.

MR. GILLESPIE: GOOD MORNING, YOUR HONOR. MATTHEW GILLESPIE FOR THE UNITED STATES.

THE COURT: GOOD MORNING.

MS. ADAMS: GOOD MORNING, YOUR HONOR. CRYSTAL ADAMS FOR THE UNITED STATES.

THE COURT: GOOD MORNING.

YOU OTHER TWO LADIES ON THE FRONT ROW NEED NOT ANNOUNCE? NO? OKAY.

ALL RIGHT. ANYONE ELSE OVER THERE?

ALL RIGHT. GOOD MORNING TO ALL OF YOU.

AND ON BEHALF OF DEFENDANT.

MR. BELINFANTE: GOOD MORNING, YOUR HONOR. JOSH BELINFANTE WITH THE ROBBINS FIRM APPEARING AS A SPECIAL ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE OF GEORGIA.

THE COURT: GOOD MORNING TO YOU.

MS. JOHNSON: GOOD MORNING, YOUR HONOR. MELANIE JOHNSON, ALSO WITH THE ROBBINS FIRM, APPEARING ON BEHALF OF THE STATE OF GEORGIA.

THE COURT: GOOD MORNING, MA'AM.

MS. JOHNSON: GOOD MORNING.

MR. BEDARD: GOOD MORNING, YOUR HONOR. ED BEDARD ALSO WITH THE ROBBINS FIRM ON BEHALF OF THE STATE OF GEORGIA.

THE COURT: YES, SIR. GOOD MORNING.

MR. PICO-PRATS: GOOD MORNING, YOUR HONOR. JAVIER PICO-PRATS ON BEHALF OF THE ROBBINS FIRM ON BEHALF OF THE STATE OF GEORGIA.

THE COURT: GOOD MORNING, SIR.

MS. EDMONDSON: GOOD MORNING. ANNA NICOLE EDMONDSON ON BEHALF OF THE STATE AND THE ROBBINS FIRM.

THE COURT: GOOD MORNING, MA'AM.

MS. HERNANDEZ: GOOD MORNING. DANIELLE MARIA HERNANDEZ, ALSO WITH THE ROBBINS FIRM, ON BEHALF OF THE STATE OF GEORGIA.

THE COURT: GOOD MORNING TO YOU. THANK YOU.

ANYBODY ELSE ON BEHALF OF DEFENDANT?

ALL RIGHT. WELL, THANK YOU SO MUCH.

WELL, I DO APPRECIATE THAT YOU ALL HAVE PROVIDED US WITH A PROPOSED SCHEDULE FOR THE HEARING, WHICH I SEE NO ISSUES WITH.

I WILL TELL YOU, JUST BY A QUICK SHOW OF HANDS, IS ANYONE HERE TODAY THAT WAS HERE YESTERDAY FOR THE REVIEW OF THE COURTROOM TECHNOLOGY? OKAY.

SO YESTERDAY OUR MICROPHONES WERE ON, AS THEY OFTEN ARE WHEN WE ARE LISTENING TO THINGS IN CHAMBERS. AND I HEARD SOMEONE, AND I DON'T KNOW WHO, SAY, THIS IS GOING TO TAKE ALL DAY ON THURSDAY.

AND I LOOKED BACK AT MY SCHEDULE, AND I SAID, HUH, I'M CALCULATING ABOUT FOUR HOURS. AND I THINK I EVEN

PREVIOUSLY OFFERED FRIDAY, IN CASE THIS GOES OVER, SO WHERE THE ALL DAY IS COMING FROM I'M NOT SURE. I'M NOT SURE IF THERE HAS BEEN A CHANGE I'M NOT AWARE OF. BUT THAT'S WHAT I OVERHEARD SOMEONE SAY YESTERDAY. SO WE'LL SEE HOW THIS UNFOLDS.

I ASSUME UNLESS I AM TOLD OTHERWISE THAT THE PROPOSED SCHEDULE THAT YOU ALL HAVE PRESENTED ALSO INDICATES THE ORDER IN WHICH YOU ALL WANT TO PRESENT, WHICH IS THE ORDER IN WHICH I CALLED THE -- THE MOTIONS. SO I'M GOING TO JUST LOOK AROUND AND SCAN THE ATTORNEYS TO SEE IF ANYONE STANDS TO TELL ME THAT THAT IS NOT RIGHT.

I DON'T SEE THAT, SO I'M ASSUMING THAT THAT IS CORRECT. SO WE'RE GOING TO START WITH DEFENDANT'S MOTION FOR SUMMARY JUDGMENT. AND I WILL JUST ASK AT THIS TIME IF THERE IS ANYTHING WE NEED TO TAKE UP BEFORE GOING RIGHT INTO THAT ARGUMENT.

ON BEHALF OF PLAINTIFF?

MS. WOMACK: YES, YOUR HONOR, JUST A COUPLE OF THINGS. ONE, WE DID WANT TO NOTE FOR THE COURT, THE PROPOSED SCHEDULE THAT THE JOINT PARTIES SUBMITTED IS ACCURATE. FOR THE FIRST MOTION THAT YOUR HONOR CALLS, THE UNITED STATES HAS 30 MINUTES. THERE WILL BE TWO ATTORNEYS SPLITTING THAT ARGUMENT EQUALLY 15 MINUTES APIECE. SO I JUST WANTED TO MAKE SURE YOUR HONOR WAS AWARE OF THAT.

AND THEN TWO OTHER QUICK HOUSEKEEPING MATTERS. JUST FOR THE COURT'S AWARENESS, YESTERDAY, THE UNITED STATES FILED A

REDACTED VERSION OF THE EXPERT REPORT OF DR. AMY MCCART. THAT REPORT HAD PREVIOUSLY BEEN FILED UNDER SEAL IN THE RECORD. AND SO JUST TO ENSURE THAT, YOU KNOW, THERE WAS A VERSION THAT'S REDACTED AND APPROPRIATE FOR POTENTIAL USE AS A DEMONSTRATIVE OR OTHERWISE IN A PUBLIC PROCEEDING, WE DID FILE THAT YESTERDAY.

WE HAVE HARD COURTESY COPIES SHOULD YOUR HONOR WANT THAT, BUT OBVIOUSLY THAT'S UP TO YOUR HONOR.

AND THEN THE ONLY OTHER THING I'LL NOTE IS THAT THE UNITED STATES DOES ANTICIPATE USING A NUMBER OF DEMONSTRATIVES TODAY. AGAIN, THEY WILL BE SHOWN ELECTRONICALLY. BUT SHOULD YOUR HONOR WANT ANY HARD COPIES OF THOSE, WE DO HAVE THOSE AVAILABLE FOR YOU.

THE COURT: OKAY. THANK YOU SO MUCH.

ANYTHING ELSE TO TAKE UP BEFORE WE PROCEED WITH OUR FIRST ARGUMENT?

MR. BELINFANTE: NO, YOUR HONOR. I'LL JUST LET YOU KNOW THAT IN THE FIRST MOTION, THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, MR. BEDARD WILL BE ARGUING PART OF IT. SO WE'LL HAVE A SWITCH AS WELL.

THE COURT: OKAY.

MR. BELINFANTE: BUT, OTHERWISE, WE DO HAVE A POWERPOINT. IT'S PRETTY LIMITED.

I DO HAVE HARD COPIES. AND WE CAN ALSO E-MAIL THE COURT A COPY AND OPPOSING COUNSEL AS WELL.

THE COURT: ALL RIGHT. AND SO, MS. BECK, LET ME KNOW, BECAUSE I SEE THAT THE DOCUMENT CAMERA IS PUSHED BACK, IF WE WERE DOING ELECTRONIC EXHIBITS, HOW WERE WE PLANNING TO DO THEM? HAVE YOU ALL TALKED ABOUT THIS?

MR. BELINFANTE: IF THE COURT WILL ALLOW, I'LL PLUG THIS IN, MAKE SURE.

THE COURT: SO THAT IT SHOULD COME UP ON MY SCREEN OVER HERE, MS. BECK?

THE COURTROOM DEPUTY: YES.

MR. BELINFANTE: THAT'S MY UNDERSTANDING.

AND THIS IS WHY I DON'T DO TECHNOLOGY.

THE COURT: YEAH. LET'S GET SOME OF THIS OUT OF THE WAY BEFORE THE CLOCKS ROLL, BECAUSE I DON'T, EITHER.

THE COURTROOM DEPUTY: WE PRACTICED EARLIER, SO WE DID IT.

MR. BELINFANTE: I STILL REFER TO COMPUTERS AS MACHINES, SO THIS IS NOT UNUSUAL.

THE COURT: AND I THINK THIS IS WHY OUR I.T. PEOPLE UNDERSTAND, YOU ARE NOT JUST I.T. YOU ARE VERY INSTRUMENTAL IN OUR PROCEEDINGS. SO WE APPRECIATE YOUR PRESENCE.

MR. BELINFANTE: OKAY.

THE COURT: ALL RIGHT. AND SO WE CAN GO AHEAD AND GET STARTED.

ALL RIGHT. YOU MAY PROCEED.

MR. BELINFANTE: I'M GOING TO HAVE MY PHONE UP HERE

WITH ME. I'M NOT CHECKING E-MAILS OR LOOKING AT CALLS. I'M USING IT AS A STOPWATCH.

THE COURT: WHATEVER YOU FEEL COMFORTABLE DOING. WE WILL START OUR CLOCKS GOING, TOO. BUT I KNOW THEY MAY BE AT AN AWKWARD ANGLE.

MR. BELINFANTE: YOUR HONOR, ONCE AGAIN, JOSH BELINFANTE ON BEHALF OF THE STATE OF GEORGIA.

I WOULD LIKE TO INTRODUCE TWO ADDITIONAL PEOPLE. STACEY SUBER-DRAKE IS THE GENERAL COUNSEL FOR THE DEPARTMENT OF EDUCATION. AND KRISTEN SETTLEMIRE IS HERE WITH THE ATTORNEY GENERAL'S OFFICE AS WELL.

YOUR HONOR, NO DOUBT THIS IS AN IMPORTANT CASE. THE ISSUES ARE SIGNIFICANT. AND THE QUESTIONS RAISED FOCUSING ON POLICY ARE PARTICULARLY DIFFICULT.

IMPORTANTLY, THOUGH, THEY ARE ALSO NEW. AS THE UNITED STATES INFORMED EVERYONE IN A PRESS RELEASE WHEN THE SUIT WAS FILED, THIS LAWSUIT IS THE FIRST CHALLENGE TO A STATE-RUN SCHOOL SYSTEM FOR SEGREGATING STUDENTS WITH DISABILITIES. IN FACT, AS THE COURT HAS PROBABLY NOTICED FROM THE CITATIONS IN THE BRIEFS, THIS IS THE FIRST TIME THAT OLMSTEAD APPEARS TO BE EXTENDED TO THE EDUCATION ENVIRONMENT. IT ALSO APPEARS TO BE ONE OF THE FIRST TIMES THAT AN OLMSTEAD CASE IS BEING USED IN A MENTAL HEALTH CAPACITY WITHOUT IDENTIFYING OR TREATING THE INDIVIDUALS THEMSELVES.

WHAT WE SAW RECENTLY IN THE UNITED STATES VERSUS

FLORIDA CASE, IN THE TRIAL COURT'S OPINION, THERE ARE 167 IDENTIFIED CHILDREN PLAINTIFFS. EACH OF THEM WERE ASSESSED AND REVIEWED BY THE UNITED STATES' EXPERTS. HERE THERE ARE ROUGHLY 2900 STUDENTS STILL IN GNETS. ONE EXPERT REVIEWED SEVEN FILES. ANOTHER REVIEWED ABOUT THREE PERCENT OF THOSE FILES. AND THE UNITED STATES IS ASKING THIS COURT AGAIN FOR THE FIRST TIME TO MAKE NEW LAW AND SAY THAT THAT IS SUFFICIENT. IT IS NOT UNDER BINDING PRECEDENT.

THEY'VE BROUGHT TWO CLAIMS UNDER THE ADA. ONE ALLEGES UNJUSTIFIED ISOLATION UNDER THE DEPARTMENT OF JUSTICE'S, WHAT THEY CALL, INTEGRATION MANDATE. AND THE OTHER IS AN EQUAL EDUCATION OPPORTUNITIES CLAIM. BUT WHEN CONSIDERING THESE CLAIMS, IT IS IMPORTANT, PARTICULARLY GIVEN THAT THEY ARE ASKING THE COURT TO MAKE NEW LAW, TO LOOK AT WHAT THE SUPREME COURT HAS SAID IN THE CONTEXT OF EDUCATION AND MENTAL HEALTH.

IN 1973, THE COURT SAID, EDUCATION, PERHAPS MORE THAN WELFARE ASSISTANCE, PRESENTS A MYRIAD OF INTRACTABLE ECONOMIC, SOCIAL, AND EVEN PHILOSOPHICAL PROBLEMS. JUSTICE KENNEDY'S CONTROLLING CONCURRENCE IN THE OLMSTEAD DECISION ADDRESSED MENTAL HEALTH. AND NO ONE IS DISPUTING THAT HIS OPINION IS THE CONTROLLING ONE. THERE HE SAYS, THE INQUIRY -- AND HE'S TALKING ABOUT WHAT WOULD BE AN APPROPRIATE SERVICE -- WOULD NOT BE SIMPLE. COMPARISONS OF DIFFERENT MEDICAL CONDITIONS AND THE CORRESPONDING TREATMENT REGIMENS MIGHT BE DIFFICULT, AS WOULD

BE THE ASSESSMENTS OF DEGREE OF INTEGRATION IN VARIOUS SETTINGS IN WHICH MEDICAL TREATMENT IS OFFERED.

THE COURT HAS ALSO INDICATED THAT IT LACKS, OR THE JUDICIARY LACKS, THE TYPE OF ABILITY TO -- TO ACHIEVE THE REMEDIES THAT THE PLAINTIFFS ARE SEEKING HERE, THE UNITED STATES IS SEEKING HERE, SPECIFICALLY, ORDERING APPROPRIATE SERVICES FOR AN UNDEFINED NUMBER OF INDIVIDUALS WITH AN UNCATEGORIZED CONDITION.

IN RODRIGUEZ, DEALING WITH EDUCATION, THE COURT SAID, THIS INVOLVES A PERSISTENT AND DIFFICULT QUESTIONS OF EDUCATION POLICY, ANOTHER AREA IN WHICH THIS COURT'S LACK OF SPECIALIZED KNOWLEDGE AND EXPERIENCE COUNSELS AGAINST PREMATURE INTERFERENCE WITH INFORMED JUDGMENTS MADE AT THE STATE AND LOCAL LEVELS. AND THIS CASE INVOLVES INFORMED JUDGMENTS.

EVERY STUDENT WHO HAS BEEN REFERRED TO THE GNETS SERVICES BY LOCAL OFFICIALS HAS BEEN DONE SO BY WHAT'S REFERRED TO AS THEIR IEP TEAM, WHICH INCLUDES EXPERTS AND PROFESSIONALS IN SPECIAL EDUCATION AND GENERALIZED EDUCATION. JUSTICE KENNEDY'S CONCURRENCE RAISES ANOTHER ISSUE, GRAVE CONSTITUTIONAL CONCERNS. AND THIS IS A CASE, THE OLMSTEAD CASE INVOLVING THE ADA AND THE REGULATIONS AT ISSUE HERE. GRAVE CONSTITUTIONAL CONCERNS ARE RAISED WHEN A FEDERAL COURT IS GIVEN THE AUTHORITY TO REVIEW THE STATE 'S CHOICES IN BASIC MATTERS, SUCH AS ESTABLISHING OR DECLINING TO ESTABLISH NEW PROGRAMS.

WITH THIS BACKGROUND IN MIND, THE STATE OF GEORGIA ASKS THE COURT TO GRANT SUMMARY JUDGMENT FOR TWO REASONS:

FIRST, THE DEPARTMENT LACKS CONSTITUTIONAL STANDING. MR. BEDARD WILL BE SPEAKING TO THE INJURY AND FACT REQUIREMENT. I WILL BE RESERVING THE ISSUES OF TRACEABILITY AND REDRESSABILITY FOR THE UNITED STATES' PARTIAL MOTION FOR SUMMARY JUDGMENT, AS THEY ARE INTERTWINED WITH THE QUESTION OF ADMINISTRATION.

SECOND, THE DEPARTMENT HAS NOT DEMONSTRATED A MATERIAL QUESTION OF FACT FOR THE ELEMENTS UNDER OLMSTEAD. ONE, THE STATE DOES NOT ADMINISTER THE GNETS PROGRAM. AND THAT IS THE WORDS IN THE REGULATION. AND I WILL BE RESERVING THAT ARGUMENT FOR THE PARTIAL MOTION FOR SUMMARY JUDGMENT.

AND, TWO, THE UNITED STATES HAS NOT IDENTIFIED A SINGLE STUDENT FOR WHOM THERE HAS BEEN A DETERMINED THE ELEMENTS OF OLMSTEAD HAVE BEEN MADE. AND THERE HAS BEEN A RECENT DEVELOPMENT IN THIS IN THE ELEVENTH CIRCUIT. OTHER THAN THE OLMSTEAD CASE ITSELF, WHICH CAME FROM THE STATE OF GEORGIA, THE ELEVENTH CIRCUIT HAS NOT REALLY FOCUSED ON OR HAD AN OPPORTUNITY TO LOOK AT OLMSTEAD ISSUES UNTIL RECENTLY. THE CASE THAT WE WERE BEFORE THIS COURT ON THE MOTION TO DISMISS THAT IT ULTIMATELY DECIDED AND SAID THAT THE UNITED STATES HAD STATUTORY STANDING AND COULD BRING A CLAIM UNDER THE STATUTE OF THE ADA.

WHAT THE ELEVENTH CIRCUIT SAID IN THE 2019 DECISION

IS THAT THE -- A DETERMINATION BY STATE'S TREATMENT PROFESSIONALS THAT A PLACEMENT IS APPROPRIATE. THAT IS NOW BINDING PRECEDENT, WHICH IT WAS NOT AT THE TIME OF THE MOTION FOR SUMMARY JUDGMENT. NOR HAS THE UNITED STATES SHOWN THAT INDIVIDUALS -- ANY INDIVIDUAL THAT IS AT ISSUE PREFERS THE GENERAL EDUCATION ENVIRONMENT, NOR HAS IT ARTICULATED ANYTHING REGARDING A REASONABLE ACCOMMODATION, BECAUSE IT IS MERELY JUST DONE THAT. I'M SORRY. IT HAS ARTICULATED IT, BUT THERE IS NO EVIDENCE SHOWING ANY LEVEL OF REASONABLENESS IN THIS CASE.

THE FACTS FOR THE PURPOSES OF THE MOTION FOR SUMMARY JUDGMENT ARE NOT PARTICULARLY MANY OR COMPLEX. ONE, AS WE'VE ARGUED TO THE COURT BEFORE, THE SUPREME COURT OF GEORGIA HAS SAID IN THE COX DECISION FROM 2011 THAT, AS A MATTER OF STATE CONSTITUTIONAL LAW, THE CONSTITUTION EMBODIES THE FUNDAMENTAL PRINCIPLE OF EXCLUSIVE CONTROL FOR THE LOCAL SYSTEMS AND K-12 PUBLIC EDUCATION. THE CONSTITUTION SAYS IN ARTICLE EIGHT, SECTION FIVE, PARAGRAPH TWO, THAT ANY EDUCATION DECISIONS ARE UNDER THE LOCAL BOARD OF EDUCATION. AND IN THE NEXT PARAGRAPH, WITH A SCHOOL SUPERINTENDENT.

THE STATE STATUTES FOLLOW THAT. AND THIS IS CRITICAL, PARTICULARLY FOR THE ADMINISTRATION SIDE, THAT LOCAL SCHOOL SYSTEMS -- AND THIS IS CODE SECTION 20-2-152(B) -- LOCAL SCHOOL SYSTEMS SHALL PROVIDE SPECIAL EDUCATION PROGRAMS.

SO WHAT DOES THE DEPARTMENT OF EDUCATION DO? IT CAN PROMULGATE RULES AND REGULATIONS GOVERNING STATE AID. IT CAN

PROVIDE VOLUNTARY AID TO LOCAL SCHOOL DISTRICTS. BUT, IMPORTANTLY, THE GNETS RULE, WHICH IS THE ONE AT 160-4-7-.15, LEAVES THE QUESTIONS THAT THE UNITED STATES SAYS ARE SO DISCRIMINATORY SOLELY TO LOCAL SCHOOL OFFICIALS AND, IN PARTICULAR, TREATMENT OFFICIALS IN THE IEP TEAM. AS INDICATED -- AND THIS IS PARAGRAPH 5(B)(8) OF THE GNETS RULE -- NO STUDENT CAN BE REFERRED TO THE GNETS PROGRAM UNLESS THEIR IEP TEAM SAYS THEY CAN. AND THERE ARE NO STATE OFFICIALS ON THE IEP TEAM.

WHAT DOES THE DEPARTMENT OF COMMUNITY HEALTH DO? IT ADMINISTERS THE MEDICAID PROGRAM, OR IT OVERSEES THE MEDICAID PROGRAM. IT REIMBURSES PROVIDERS.

AND WHAT DOES THE DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL DISABILITIES DO IN THIS CONTEXT? IT OVERSEES THE APEX PROGRAM, WHICH IS PROVIDED IN GENERAL EDUCATION SCHOOLS TO PROVIDE THE SAME SERVICES THAT ARE TO BE PROVIDED IN THE GNETS PROGRAM. IT IS A VOLUNTARY PROGRAM AS WELL.

WITH THOSE FACTS IN MIND, I WILL TURN IT TO MR. BEDARD, WHO WILL NOW FOCUS ON THE INJURY IN FACT FOR CONSTITUTIONAL STANDING.

THE COURT: THANK YOU.

MR. BELINFANTE: THANK YOU.

MR. BEDARD: GOOD MORNING, YOUR HONOR.

THE COURT: GOOD MORNING.

MR. BEDARD: AS MR. BELINFANTE SAID, I'M HERE TO TALK

ABOUT STANDING. AND JUST AS A QUICK REMINDER FOR ALL OF US, BECAUSE THE LANGUAGE CAN BE A LITTLE CONFUSING SOMETIMES, THERE'S TWO DIFFERENT TYPES OF STANDING. THERE'S CONSTITUTIONAL STANDING, STATUTORY STANDING. CONSTITUTIONAL STANDING, OF COURSE, IS JURISDICTIONAL. IT ASKS WHETHER THE COURT IS AUTHORIZED TO HEAR THE CASE. STATUTORY STANDING IS NOT JURISDICTIONAL AND INSTEAD ASKS WHETHER THE PLAINTIFF IS ONE WHO IS AUTHORIZED TO BRING THAT CLAIM.

IN THE UNITED STATES VERSUS FLORIDA CASE MR. BELINFANTE MENTIONED, THE ELEVENTH CIRCUIT HELD THAT DOJ HAS STATUTORY STANDING UNDER THE ADA, BUT IT DIDN'T ADDRESS THE UNITED STATES' CONSTITUTIONAL STANDING TO BE ABLE TO BRING THIS CASE. IT WASN'T AT ISSUE THERE. IT WAS MERELY PRESUMED. AND THAT'S REALLY WHAT I WANT TO ADDRESS HERE.

THE COURT'S, YOU KNOW, WELL FAMILIAR WITH THE ARTICLE III REQUIREMENTS FOR STANDING. I WON'T BELABOR THEM. IT NEEDS TO DEMONSTRATE INJURY -- THE PLAINTIFF NEEDS TO DEMONSTRATE INJURY IN FACT TRACEABLE TO THE DEFENDANT AND REDRESSABLE BY JUDICIAL RELIEF.

AS MR. BELINFANTE MENTIONED, TRACEABILITY AND REDRESSABILITY WOULD BE ADDRESSED IN MORE DEPTH WITH RELATION TO UNITED STATES' PARTIAL MOTION. THE QUESTION FOR THE INJURY IN FACT BEFORE THE COURT, THOUGH, IS WHOSE INJURY NEEDS TO BE DEMONSTRATED. AND THAT QUESTION REALLY COMES DOWN TO, IN WHAT CAPACITY IS THE UNITED STATES SUING. WHOSE INJURY IS IT

BRINGING THIS CASE ON BEHALF OF. SOMETIMES THE FEDERAL GOVERNMENT CAN SUE TO REMEDY ITS OWN INJURY. IN THE CRIMINAL CONTEXT, FOR EXAMPLE, IT'S SUING ON BEHALF OF ITS INTEREST AS THE SOVEREIGN TO JUSTIFY, YOU KNOW, TO VINDICATE THE RIGHTS OF THE PUBLIC. BUT IN OTHER CASES IT SUES IN A REPRESENTATIVE CONTEXT. IT SUES TO BRING SOMEBODY ELSE'S CLAIM.

THE MOST PREVALENT EXAMPLE OF THIS IS WHEN STATES BRING A CASE PARENS PATRIAE ON BEHALF OF THEIR CITIZENS.

AND IN THOSE CASES, IT'S NOT ENOUGH TO DEMONSTRATE THAT THE GOVERNMENTAL ENTITY HAS ITS OWN INTERESTS. THAT IS CERTAINLY NECESSARY. BUT IT MUST ALSO DEMONSTRATE THAT THE PEOPLE ON WHOSE BEHALF IT IS SUING HAVE THEIR OWN ARTICLE III INJURY. THIS IS NO DIFFERENT THAN A QUI TAM CASE, FOR EXAMPLE, WHERE THE QUI TAM REALTOR NEEDS TO NOT ONLY DEMONSTRATE THEIR OWN INTEREST BUT ALSO THE INTEREST OF THE UNITED STATES ON WHOSE BEHALF THEY ARE BRINGING THE CASE, OTHER THIRD-PARTY STANDING CASES, AND THE PARENS PATRIAE CASES THAT I MENTIONED BEFORE.

AND, YOU KNOW, DETERMINING IN WHAT CAPACITY THE UNITED STATES IS BRINGING THIS LAWSUIT IS REALLY DETERMINED BY FOCUSING ON THE UNDERLYING CLAIM ITSELF. AND HERE I THINK IT'S IMPORTANT TO LOOK AT TITLE II. WHAT DOES TITLE II AUTHORIZE AS FAR AS A REMEDY IS CONCERNED. AND HOW DID THE ELEVENTH CIRCUIT INTERPRET THAT IN THE UNITED STATES VERSUS FLORIDA CASE.

HERE TITLE II PROVIDES REMEDIES FOR, QUOTE, PERSONS

WHO HAVE SUFFERED DISCRIMINATION. THAT'S AT 42 U.S.C. 12133, WHERE IT SAYS, THE REMEDIES AVAILABLE UNDER THE REHABILITATION ACT SHALL BE THE REMEDIES THAT THIS SUBCHAPTER PROVIDES TO ANY PERSON ALLEGING DISCRIMINATION ON THE BASIS OF DISABILITY.

BASED ON THAT LANGUAGE, FLORIDA CHALLENGED DOJ STANDING TO SUE UNDER TITLE II IN THE FLORIDA CASE ARGUING THE DOJ IS ADMITTEDLY NOT A PERSON ALLEGING DISCRIMINATION. THE ELEVENTH CIRCUIT ULTIMATELY HELD THAT DOJ HAD STATUTORY STANDING TO BRING THE ENFORCEMENT ACTION, BUT NOT BECAUSE IT WAS A PERSON ALLEGING DISCRIMINATION. INSTEAD, THEY SAID THAT A DOJ ENFORCEMENT ACTION WAS A REMEDY WHICH WAS AVAILABLE TO PERSONS ALLEGING DISCRIMINATION.

AS JUDGE JILL PRYOR, WHO WAS A MEMBER OF THAT PANEL THAT ISSUED THAT PANEL OPINION, LATER SAID IN AN OPINION DENYING REHEARING EN BANC, THE DOJ BRINGS THESE CLAIMS TO VINDICATE THE MEDICALLY-FRAGILE CHILDREN'S RIGHTS. THEY SUE ON BEHALF OF THE AGGRIEVED PERSON. IN FACT, HE SAID VERY CLEARLY, THE ATTORNEY GENERAL DID NOT BRING THIS LAWSUIT ON HIS OWN BEHALF BUT, RATHER, ON BEHALF OF THE MEDICALLY-FRAGILE CHILDREN. SO THE ALLEGED INJURY HERE IS NOT ULTIMATELY THE INJURY TO THE UNITED STATES SUING IN SOME ARICLE II ENFORCEMENT CAPACITY BUT IS, INSTEAD, IT'S SUING AS A THIRD PARTY BRINGING SOMEONE ELSE'S CLAIM ON THEIR BEHALF.

SO THE UNITED STATES MUST DEMONSTRATE AN UNDERLYING ARTICLE III INJURY TO THE STUDENTS AT ISSUE HERE. AND, OF

COURSE, THEY HAVEN'T DONE SO. THEY HAVEN'T IDENTIFIED A SINGLE STUDENT WHOM THE UNITED STATES SAYS WOULD OTHERWISE BE SERVED IN A GENERAL EDUCATION SETTING HAD THEY RECEIVED A PARTICULAR SERVICE, NOR HAVE THEY IDENTIFIED A SINGLE STUDENT WHO WOULD HAVE RECEIVED A PARTICULAR STUDENT HAD THEY NOT BEEN IN GNETS. THIS STANDS IN STARK CONTRAST TO THE WORK THE DOJ DID IN THE FLORIDA CASE WHERE, AS MR. BELINFANTE MENTIONED, THEY REVIEWED 150, APPROXIMATELY, INDIVIDUAL STUDENT'S FILES. THEIR EXPERTS MADE INDIVIDUALIZED DETERMINATIONS ABOUT EACH ONE OF THOSE STUDENTS. UNITED STATES HASN'T DONE THAT WITH ANY ACTUAL STUDENT HERE. SO, INSTEAD, THEY ALSO ALLEGE AN AT-RISK THEORY. AND THEY SAY THAT THERE ARE STUDENTS WHO ARE AT RISK OF ENTERING GNETS.

THE PROBLEM WITH THAT THEORY, THOUGH, IS THAT THE UNITED STATES NEEDS TO FIRST DEMONSTRATE THAT ENTERING GNETS ITSELF IS A VIOLATION OF TITLE II. AND THEY HAVEN'T DONE THAT. THEY HAVEN'T EVEN ATTEMPTED TO DO THAT. THEIR EXPERTS DON'T SAY THAT. THEY DON'T GO SO FAR AS TO SAY THAT GNETS OR EVEN A SEPARATED EDUCATIONAL SETTING FOR STUDENTS WITH BEHAVIORAL DISORDERS IS PER SE DISCRIMINATORY, NOR CAN THEY. JUSTICE GINSBURG'S PLURALITY OPNINION IN OLMSTEAD EMPHASIZES, AND I QUOTE, WE EMPHASIZE THAT NOTHING IN THE ADA OR ITS IMPLEMENTING REGULATIONS CONDONES TERMINATION OF INSTITUTIONAL SETTINGS FOR PERSONS UNABLE TO HANDLE OR BENEFIT FROM COMMUNITY SETTINGS.

SO THE SIMPLE RISK OF ENTERING GNETS CANNOT ITSELF BE

AN AT RISK -- THE TYPE OF CERTAINLY IMPENDING AT-RISK INJURY THAT SATISFIES ARTICLE III.

SO WITH THAT, I WILL TURN IT BACK OVER TO MR. BELINFANTE TO TALK ABOUT THE MERITS OF THE UNITED STATES' CLAIMS RESERVING, AGAIN, THE TRACEABILITY AND REDRESSABILITY ISSUES FOR UNITED STATES' PARTIAL MOTION.

MR. BELINFANTE: YOUR HONOR, I'LL START WITH THE MERITS OF THE UNJUSTIFIED ISOLATION CLAIM. IT IS BASED ON THE OLMSTEAD DECISION, AS WE INDICATED, AND THE ELEVENTH CIRCUIT IN 2019 REAFFIRMED THESE THREE ELEMENTS AS PART OF AN OLMSTEAD CLAIM, AND THEY ARE TO BE TAKEN TOGETHER.

AT SUMMARY JUDGMENT, THE UNITED STATES BEARS THE BURDEN OF SHOWING MATERIAL QUESTION OF FACT AS TO EACH OF THEM. AND THERE'S AN ABSENCE OF EVIDENCE AS TO JUST ABOUT ALL OF THEM.

THE FIRST PROBLEM IS THAT THE UNITED STATES DOES NOT CONDUCT AN INDIVIDUALIZED ANALYSIS, AS THEY DID IN THE FLORIDA CASE. AS A MATTER OF STATUTORY LAW, THAT IS IN ERROR.

LOOKING AT THE AMERICANS WITH DISABILITIES ACT, IT FOCUSES ON QUALIFIED INDIVIDUALS, NOT A GROUP. IT'S ALSO TRUE AS A MATTER OF PRECEDENT THAT THERE HAS TO BE AN INDIVIDUALIZED ASSESSMENT. THE OLMSTEAD DECISION SAYS AT 581 -- AND THIS IS THE PLURALITY DECISION -- THAT THE STATE MAY RELY ON REASONABLE ASSESSMENTS OF ITS OWN PROFESSIONALS IN DETERMINING WHETHER AN INDIVIDUAL MEETS THE ESSENTIAL ELIGIBILITY REQUIREMENTS. AND

IT REJECTED IN THE KENNEDY CONCURRENCE THE APPROACH TAKEN BY THE UNITED STATES IN THIS CASE.

THERE THE CONTROLLING OPINION OF JUSTICE KENNEDY SAYS, THE ISSUE OF WHETHER RESPONDENTS HAVE DISCRIMINATED UNDER THE ADA BY INSTITUTIONALIZED TREATMENT CANNOT BE DECIDED IN THE ABSTRACT. YET, THAT IS EXACTLY WHAT THE UNITED STATES IS ASKING THIS COURT TO DO AND ASKING THIS COURT TO BE THE FIRST TO DO SO IN THE EDUCATIONAL CONTEXT.

IT IS ALSO TRUE THAT THE -- AGAIN, THE ELEVENTH CIRCUIT HAS NOW ADOPTED THE LANGUAGE OF OLMSTEAD, WHICH IT HAD NOT PREVIOUSLY. WE WILL ALSO POINT THE COURT TO THE RECENT DECISION OF THE FIFTH CIRCUIT IN UNITED STATES VERSUS MISSISSIPPI. IT'S THE MOST RECENT APPELLATE COURT TO LOOK AT THIS ISSUE. AND IT SAYS -- AND IT REVERSED A JURY -- OR, EXCUSE ME, AN INJUNCTION IN FAVOR OF THE UNITED STATES ON THIS GROUND.

LIKE HERE, THE FEDERAL GOVERNMENT, QUOTE, CHARGED THAT DUE TO SYSTEMATIC DEFICIENCIES IN THE STATE'S OPERATION OF MENTAL HEALTH PROGRAMS, THERE WAS DISCRIMINATION. BUT JUDGE JONES SAID NO. APPROPRIATE TREATMENT FOR THOSE WITH SERIOUS MENTAL ILLNESS AS OLMSTEAD CLEARLY UNDERSTOOD MUST BE INDIVIDUALIZED. AND, IMPORTANTLY, WITH THE MISSISSIPPI CASE, IS IT ANALYZES, DISTINGUISHES, AND SHOWS WHY EVERY CASE THE UNITED STATES RELIES ON ON THIS POINT IS NO LONGER GOOD LAW AFTER KISOR, BECAUSE EACH OF THOSE CASES AFFORDED THE

DEPARTMENT OF JUSTICE A GREATER DEAL OF DEFERENCE THAN IS NOW THE LAW IN THE UNITED STATES.

THE DEPARTMENT DOES NOT RESPOND AT ALL TO THE STATE'S CHARACTERIZATION AND DESCRIPTION OF OLMSTEAD. IT SIMPLY DOUBLES DOWN ON A REVERSED NEW YORK DISTRICT COURT DECISION IN DAI. YOUR HONOR, THAT CONSTITUTES WAIVER. UNDER THE CASE VERSUS ESLINGER DECISION FROM THE ELEVENTH CIRCUIT IN 2009, THE COURT SAID, A PARTY CANNOT READILY COMPLAIN ABOUT THE ENTRY OF A SUMMARY JUDGMENT ORDER THAT DID NOT CONSIDER AN ARGUMENT THEY CHOSE NOT TO DEVELOP. IT CITES THE JOHNSON VERSUS GEORGIA BOARD OF REGENTS DECISION FROM THE ELEVENTH CIRCUIT IN 2001.

THERE IT SAID, ONCE THE ARGUMENT WAS RAISED, IT, QUOTE, BECAME INCUMBENT UPON THE INTERVENORS TO RESPOND BY, AT THE VERY LEAST, RAISING IN THEIR OPPOSITION PAPERS ANY AND ALL ARGUMENTS OR DEFENSES THEY FELT PRECLUDED JUDGMENT.

HERE, THE UNITED STATES HAS EFFECTIVELY CONCEDED THAT OLMSTEAD ITSELF AND THE UNITED STATES VERSUS FLORIDA DECISION REQUIRE INDIVIDUALIZED ASSESSMENTS. AND THE UNITED STATES HAS NOT DONE THAT. AND THEY HAVE NOT PUT FORWARD EVIDENCE ON IT. WE WILL RELY ON -- TO THE EXTENT THEY CITE FACTS, WHICH IS ABOUT ONE STATEMENT IN A DEPOSITION WHICH WAS HEARSAY, AND A REVIEW OF DR. MCCART OF THREE PERCENT OF STUDENT FILES TO OUR BRIEF.

THE SECOND ISSUE THAT THEY HAVE NOT SHOWN ON SUMMARY JUDGMENT IS THAT A DETERMINATION OF APPROPRIATE PLACEMENTS

REQUIRE EVALUATIONS BY THE STATE'S TREATMENT PROFESSIONALS OR AT LEAST SOME TREATMENT PROFESSIONALS. THIS IS A MATTER OF LAW UNDER OLMSTEAD AND NOW IN THE ELEVENTH CIRCUIT. AS A MATTER OF FACT, IT IS UNDISPUTED THAT THERE IS NO IEP TEAM WHERE DR. MCCART OR DR. PUTNAM SAID THAT DECISION WAS WRONG.

AND, IMPORTANTLY -- AND THIS GETS INTO THE I.D.E.A. ISSUE -- ONCE THE IEP TEAM MAKES A RECOMMENDATION, UNDER THE I.D.E.A., THE STATE CANNOT OVERRIDE THAT. SO THE DEPARTMENT OF JUSTICE IS PUTTING THE STATE IN AN UNTENABLE POSITION. THEY WANT THE STATE OF GEORGIA TO OVERRIDE AN IEP TEAM TO SOLVE AN ADA PROBLEM THAT IS MOOT.

IF THE STATE DOES THAT, THE UNITED STATES DEPARTMENT OF EDUCATION, WHICH ENFORCES THE I.D.E.A., COULD BRING A CLAIM AND SAY, YOU ARE VIOLATING THE I.D.E.A. THIS IS WHY THE CASE HAS NOT PROCEEDED. AND THIS IS WHY IT IS A NEW ARGUMENT AND A WRONGFUL EXPANSION OF THE AMERICANS WITH DISABILITIES ACT.

THE REQUIREMENT OF INDIVIDUAL ASSESSMENTS BY A TREATING PROFESSIONAL COULD NOT BE CLEARER. JUSTICE KENNEDY'S CONCURRENCE SAYS, IT IS OF CENTRAL IMPORTANCE THAT COURTS APPLY TODAY A DECISION OF THE GREAT DEFERENCE TO THE MEDICAL DECISIONS OF A RESPONSIBLE TREATING PHYSICIAN.

AND THIS MAKES SENSE. AS JUSTICE GINSBURG WROTE IN THE PLURALITY DECISION OF OLMSTEAD, SOME INDIVIDUALS, LIKE THE TWO PLAINTIFFS IN THAT CASE, MAY NEED INSTITUTIONAL CARE FROM TIME TO TIME. FOR OTHER INDIVIDUALS, NO PLACEMENT OUTSIDE AN

INSTITUTION MAY EVER BE APPROPRIATE.

SO WE HAVE A SPECTRUM. THE COURT SAID, A SEPARATE FACILITY IS NOT PER SE DISCRIMINATORY. THAT'S WHY IT HAS TO BE UNJUSTIFIED ISOLATION. AND WHAT MAKES IT UNJUSTIFIED IS IF THE STATE'S TREATMENT PROFESSIONALS SAY THIS PERSON WOULD DO BETTER OR COULD BE APPROPRIATELY SERVED IN A LESS RESTRICTIVE ENVIRONMENT. DR. MCCART AND DR. PUTNAM AGREE. THE ONLY PERSON SAYING SOMETHING DIFFERENT IS THE UNITED STATES DEPARTMENT OF JUSTICE.

NOW, THIS COURT REJECTED THIS ARGUMENT AT THE MOTION-TO-DISMISS STAGE. AND IT DID IT FOR TWO REASONS.

ONE, IT CITED THE DAI CASE FROM THE DISTRICT COURT OF DISTRICT OF COLUMBIA IN 2012. IN THAT CASE, WHAT THE JUDGE FOCUSED ON WAS A CONCERN THAT IF STATE'S TREATMENT PROFESSIONALS WERE REQUIRED, A STATE COULD SIMPLY NOT OBSERVE SOMEONE AND SAY, WELL, THE FIRST ELEMENT IS NOT MET.

THAT DOESN'T APPLY IN EDUCATION, BECAUSE THE I.D.E.A. MANDATES THAT AN IEP TEAM OF TREATMENT PROFESSIONALS EVALUATE EACH STUDENT, AND EACH STUDENT CANNOT BE REFERRED TO GNETS UNLESS THAT IS THE RECOMMENDATION OF THEIR IEP TEAM. BUT, ALSO, SINCE THE COURT -- AND THE COURT ALSO RECOGNIZED THAT UNDER A 12(B)(6) STANDARD, IT HAD TO ACCEPT THE ALLEGATIONS IN THE COMPLAINT AS TRUE. IT NO LONGER HAS TO DO THAT AND, UNDER RULE 56, CANNOT.

BUT MOST IMPORTANTLY IS THAT THE ELEVENTH CIRCUIT HAS

NOW ADDRESSED THE ISSUE. WHEN THE ELEVENTH CIRCUIT SAID THAT THE UNITED STATES CAN BRING A TITLE II CLAIM, IT DESCRIBED AN ELEMENT OF OLMSTEAD AS A DETERMINATION BY THE STATE'S TREATMENT PROFESSIONALS THAT SUCH PLACEMENT IS APPROPRIATE. AND IT USED THAT IN THE LAST PARAGRAPH IN STRIKING THE BALANCE OF FEDERALISM AND THE AMERICANS WITH DISABILITIES ACT. IT IS PART OF THE DECISION.

HERE AGAIN, ON THE ISSUE OF TREATMENT PROFESSIONALS, THE UNITED STATES FAILS TO ADDRESS OLMSTEAD. THAT IS WAIVER UNDER JOHNSON AND CASE. INSTEAD, IT MAKES THE REMARKABLE ARGUMENT THAT TITLE II'S INTEGRATION MANDATE, I.E., A DOJ REGULATION, DOES NOT REFER TO TREATMENT PROFESSIONALS. THAT'S AT DOCKET 446, PAGE 11. YOUR HONOR, THE OLMSTEAD CASE INTERPRETED AND APPLIED THE DEPARTMENT'S REGULATION AND SAID, ABSENT SUCH QUALIFICATION OF APPROPRIATE SERVICES BY A TREATMENT PROFESSIONAL, IT WOULD BE INAPPROPRIATE TO REMOVE A PATIENT FROM A MORE RESTRICTIVE SETTING. THAT'S PAGE 602.

THE FACTUAL ARGUMENTS, TO THE EXTENT THAT THEY ARE THERE, THERE ARE FIVE IEP'S CITED, NOTHING SYSTEMATIC. AND THEIR CLAIM THAT AN IEP TEAM IS NOT A TREATING PHYSICIAN IS A RED HERRING. IT IS A TREATMENT PROFESSIONAL. AND THE REASON THAT TREATING PHYSICIANS WAS USED IN OLMSTEAD IS BECAUSE THOSE WERE THE PEOPLE REVIEWING THE PATIENT. AND JUSTICE KENNEDY MAKES CLEAR, THOSE DECISIONS ARE ENTITLED TO THE GREATEST DEFERENCE.

THE NEXT ELEMENT, THE LACK OF OPPOSITION, YOU HAVE TO SHOW THAT SOMEONE WANTS COMMUNITY TREATMENT. THE UNITED STATES -- AND THAT'S A CLEAR ELEMENT OF OLMSTEAD. THE UNITED STATES SAYS, WELL, WE DON'T HAVE TO DO THAT. BUT THAT'S NOT HOW SUMMARY JUDGMENT WORKS. IT'S AN ELEMENT OF THE CLAIM. AND THEY'VE NOT SHOWN IT, AND PRECEDENT SAYS OTHERWISE, BOTH OLMSTEAD AND THE UNITED STATES VERSUS FLORIDA DECISION FROM THE ELEVENTH CIRCUIT.

FACTUALLY, THEY CITE TO ONLY EIGHT INDIVIDUALS IN THEIR BRIEF, 448-1 AT PAGES 18 AND 19, NOTE 20, AND ASK THE COURT TO PRESUME THAT INDIVIDUALS WOULD LIKELY CHOOSE MORE INTEGRATED SETTING. THAT'S NOT WHAT RULE 56 ALLOWS.

ON THE ELEMENT OF REASONABLE ACCOMMODATION, THE ELEVENTH CIRCUIT HERE IS CLEAR AS WELL. IN THE BIRCOLL DECISION, IT SAYS, WHAT IS REASONABLE MUST BE DECIDED ON A CASE-BY-CASE BASIS BASED ON NUMEROUS FACTORS. AND IT IS PART OF THE PLAINTIFF'S PRIMA FACIE BURDEN IN AN ADA CASE, WHICH THE UNITED STATES AGREES.

NOW, IMPORTANTLY, WHAT THEIR REMEDIES ARE IS TO EXPAND AN APEX PROGRAM AND TO EXPAND OR MANDATE A -- DR. MCCART'S PREFERRED POLICY OF MTSS, OR IT'S A TYPE OF TRAINING IN SCHOOLS TO DEAL WITH CHILDREN WITH BEHAVIOR ISSUES. OLMSTEAD SAYS, THOUGH, YOU CAN'T MANDATE THE EXPANSION OF SERVICES THAT ARE NOT THERE. AND TO THE EXTENT THAT DR. MCCART -- AND WE WILL GET INTO THIS ON THE DAUBERT -- MAKES AN

ARGUMENT THAT THE PROGRAM SHOULD BE EXPANDED, SHE ACKNOWLEDGES SHE DOESN'T KNOW WHAT THE STATE IS CURRENTLY DOING. SO TO THE EXTENT THEY ARE RELYING ON DR. MCCART'S OPINION, IT IS SPECULATIVE, AT BEST, INADMISSIBLE, AND SHOULD NOT BE CONSIDERED AT SUMMARY JUDGMENT.

NEXT THEY TALK ABOUT AT-RISK INDIVIDUALS. THIS IS WHERE THE UNITED STATES VERSUS MISSISSIPPI CASE IS SO IMPORTANT. THEY SAY IT'S NOT JUST THE PEOPLE IN GNETS, IT'S THE PEOPLE THAT COULD GO TO GNETS.

THE PROBLEM THERE, YOUR HONOR, IS THAT THE ADA SAYS YOU HAVE TO UNDERGO DISCRIMINATION. AND WHAT THE UNITED STATES IS SEEKING TO DO IS REMOVE THE REQUIREMENT OF DISCRIMINATION FROM THE ADA AND SAY THAT ANYONE WHO HAS A DISABILITY IS NOW ABLE TO CLAIM A VIOLATION OF THE ADA WITHOUT ANY STATE ACTION. THAT CAN WORK IN CASES WHERE, FOR EXAMPLE, A BUILDING DOESN'T HAVE A RAMP FOR A WHEELCHAIR. THAT'S CLEAR AND PREDICTABLE. BUT AS JUSTICE KENNEDY POINTS OUT, IN DEALING WITH MENTAL HEALTH, IT IS SO INDIVIDUALIZED THAT THOSE TYPE OF PRESUMPTIONS CANNOT BE MADE.

ON THE UNEQUAL OPPORTUNITY CLAIM, HERE THE ADMINISTRATION PART IS HERE. ALL OF THE DECISIONS THE UNITED STATES IS CONCERNED ABOUT ARE DECIDED AT THE LOCAL LEVEL, NUMBER ONE. AND, NUMBER TWO, IF THE COURT LOOKS AT WHAT IS AN I.D.E.A. CLAIM, WHICH THE UNITED STATES DEPARTMENT OF JUSTICE LACKS THE ABILITY TO ENFORCE, IT IS EXACTLY WHAT THEIR

COMPLAINT SAYS.

ON THE LEFT, YOU SEE WHAT IS A FAPE, A FREE APPROPRIATE PUBLIC EDUCATION. AND ON THE RIGHT, YOU SEE PARAGRAPH 47 IN THE COMPLAINT. IT'S THE SAME. THE SUPREME COURT HAS SAID IN THE FRY DECISION THAT IF THE COMPLAINT COULD BE BROUGHT IN A PUBLIC FACILITY THAT WAS NOT A SCHOOL, AND IF AN ADULT COULD BRING THE CLAIM, IT'S PROBABLY NOT AN I.D.E.A. CLAIM. HERE, THE DEPARTMENT'S EQUAL-EDUCATION-OPPORTUNITY CLAIM CAN ONLY BE BROUGHT IN A SCHOOL AND ONLY FOR YOUTH. IT IS VERY DIFFERENT THAN THE CLAIM BROUGHT IN FRY THAT WAS DEEMED DISTINCT.

AND SO WITH THAT, YOUR HONOR, I'LL RESERVE MY REMAINING TWO MINUTES FOR REBUTTAL.

THE COURT: ALL RIGHT. THANK YOU, SIR.

MR. BELINFANTE: THANK YOU.

OH, SORRY.

MS. WOMACK: MAY IT PLEASE THE COURT.

THE COURT: YES, MA'AM.

MS. WOMACK: KELLY GARDNER WOMACK FOR THE UNITED STATES.

NEARLY EIGHT YEARS AGO, THE UNITED STATES BROUGHT SUIT AGAINST THE STATE OF GEORGIA TO ADDRESS SYSTEMIC VIOLATIONS OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT. THE UNITED STATES ALLEGES THAT THOSE SYSTEMIC VIOLATIONS ARISE FROM THE STATE OF GEORGIA'S ADMINISTRATION OF THE GEORGIA

NETWORK FOR EDUCATIONAL AND THERAPEUTIC SUPPORT PROGRAM, ALSO KNOWN AS THE GNETS PROGRAM.

THROUGH THE GNETS PROGRAM, THE STATE OF GEORGIA UNNECESSARILY SEGREGATES STUDENTS WITH BEHAVIOR-RELATED DISABILITIES, SEPARATING THOSE STUDENTS FROM THEIR GENERAL EDUCATION PEERS AND RELEGATING THEM TO INFERIOR EDUCATIONAL OPPORTUNITIES.

SINCE COMMENCEMENT OF THIS LAWSUIT, THOUSANDS OF CHILDREN HAVE BEEN PLACED IN THE GNETS PROGRAM. TWO-THIRDS OF THOSE CHILDREN ARE REMOVED FROM THEIR GENERAL EDUCATION ENVIRONMENTS ALTOGETHER AND SENT TO SEPARATE FACILITIES SERVING ONLY STUDENTS WITH DISABILITIES. THOSE SEPARATE FACILITIES ARE OFTEN AGING, DILAPIDATED SCHOOL BUILDINGS, MANY OF WHICH ARE HAND-ME-DOWNS, GIVEN TO THE GNETS PROGRAM ONLY AFTER LOCAL SCHOOL DISTRICTS DETERMINE THAT THOSE BUILDINGS' USEFUL LIFE HAS COME TO AN END.

GNETS SCHOOL BUILDINGS CHARACTERISTICALLY LACK ALL OF THE HALLMARKS THAT YOU AND I WOULD ASSOCIATE WITH A SCHOOL. THERE ARE OFTEN NO GYMNASIUMS, NO LIBRARIES, NO SCIENCE LABS, NO MUSIC ROOMS, NOT EVEN PLAYGROUNDS. THE WALLS ARE NOT BRIGHTLY DECORATED WITH STUDENT ARTWORK OR OTHER ENRICHING EDUCATIONAL MATERIALS, BUT INSTEAD ARE BARREN AND INSTITUTIONAL IN APPEARANCE.

IN THE THERAPEUTICS SERVICES AND SUPPORTS THAT THE STATE OF GEORGIA ASSERTS THE GNETS PROGRAM IS DESIGNED TO

PROVIDE ARE LOOKING, IN FACT, IN RECENT YEARS, THE STATE OF GEORGIA HAS PROVIDED A MERE 16 CLINICALLY-TRAINED PSYCHOLOGISTS, PSYCHIATRISTS, AND THERAPISTS TO SERVE THE MORE THAN 3,000 STUDENTS IN THE GNETS PROGRAM, AMOUNTING TO ONE CLINICIAN FOR EVERY 187 STUDENTS.

THE EDUCATIONAL OPPORTUNITIES THAT STUDENTS IN THE GNETS PROGRAM ARE AFFORDED PARALLEL THESE DEFICIENCIES. STUDENTS IN THE GNETS PROGRAM ARE DENIED THE OPPORTUNITY TO INTERACT WITH AND TO LEARN FROM THEIR GENERAL EDUCATION PEERS. THEY ARE OFTEN CONFINED TO A SINGLE CLASSROOM FOR THE ENTIRE DAY WHERE THEY RECEIVE MINIMAL LIVE INSTRUCTION AND ARE DEPRIVED OF ACCESS TO SPECIALS LIKE ART AND MUSIC.

UNLIKE THEIR GENERAL EDUCATION PEERS, STUDENTS IN THE GNETS PROGRAM HAVE NO SPORTS OR CHEERLEADING TEAMS TO JOIN, NO AFTER-SCHOOL CLUBS THAT SERVE AS CHANNELS FOR THEIR SELF-DISCOVERY AND GROWTH, NO SCHOOL DANCES TO DRESS UP FOR, NO YEARBOOKS FOR FRIENDS TO SIGN. CIRCUMSTANCES ARE GENERALLY NO BETTER FOR THE MINORITY OF STUDENTS IN THE GNETS PROGRAM WHO ATTEND GNETS CLASSROOMS LOCATED IN GENERAL EDUCATION SCHOOLS.

WHILE THOSE STUDENTS MAY HAVE ACCESS TO BETTER-QUALITY FACILITIES, PORTIONS OF THOSE FACILITIES OFTEN REMAIN OUT OF REACH OR OFF LIMITS TO STUDENTS IN THE GNETS PROGRAM. STUDENTS IN THE GNETS PROGRAM HAVE CLASSROOMS THAT ARE OFF THE BEATEN PATH, OFTEN LOCATED AT THE END OF HALLWAY CORRIDORS, NEAR EXITS, IN BASEMENTS, AND IN TRAILERS BEHIND

SCHOOLS.

NOT ONLY THAT, FOR MANY STUDENTS IN THE GNETS PROGRAM WHO ATTEND GNETS CLASSROOMS AND GENERAL EDUCATION SCHOOLS, THOSE STUDENTS ARE FORCED TO ENTER AND EXIT THEIR SCHOOL BUILDINGS THROUGH DOORS DIFFERENT FROM THE ONES USED BY THEIR GENERAL EDUCATION PEERS. AND, YET, THE STATE OF GEORGIA HAS JUST COMMITTED ANOTHER $53 MILLION TO SUSTAIN THE GNETS PROGRAM FOR THE COMING FISCAL YEAR.

AGAINST THIS BACKDROP, THE STATE SEEKS YET AGAIN TO DELAY AND POTENTIALLY FORECLOSE ALTOGETHER A TRIAL THAT PROMISES LONG-AWAITED RELIEF FOR THE THOUSANDS OF PUBLIC-SCHOOL CHILDREN WHOSE EXPERIENCES I'VE JUST DESCRIBED.

IN PARTICULAR, THE STATE REVISED AND REPACKAGES PROCEDURAL ARGUMENT THAT THIS COURT HAS ALREADY CONSIDERED AND PROPERLY REJECTED AT EARLIER STAGES OF THIS LITIGATION.

THE STATE ALSO ASSERTS THAT THE UNITED STATES CANNOT MAKE OUT A PRIMA FACIE OLMSTEAD CLAIM. I WILL BEGIN BY ADDRESSING THIS COURT'S WELL-REASONED DECISIONS REJECTING THE STATE'S ASSERTED PROCEDURAL BARS AND WHY THOSE DECISIONS WERE CORRECTLY DECIDED. I'LL ALSO DISCUSS WHY THE STATE'S ARGUMENTS HAVE NO MORE MERIT TODAY THAN THEY DID IN MAY 2020 OR JANUARY 2021 WHEN THIS COURT REJECTED THE STATE'S MOTION TO DISMISS AND ITS MOTION FOR JUDGMENT ON THE PLEADINGS.

MY COLLEAGUE, JESSICA POLANSKY, WILL THEN ADDRESS THE STATE'S ARGUMENTS REGARDING OUR OLMSTEAD CLAIM AND WHY THOSE

ARGUMENTS LACK MERIT.

WHILE THE FULL WEIGHT OF THE EVIDENCE THE UNITED STATES DEVELOPED IN DISCOVERY WILL BE REVEALED AT TRIAL, WE ARE CONFIDENT THAT YOUR HONOR WILL CONCLUDE THAT THE EVIDENCE OUTLINED IN OUR BRIEFS AND DISCUSSED HERE TODAY IS MORE THAN SUFFICIENT TO RAISE A GENUINE ISSUE OF MATERIAL FACT ENTITLING THE UNITED STATES TO PRESENT ITS EVIDENCE AT TRIAL. GIVEN THE THOUSANDS OF STUDENTS IN THE GNETS PROGRAM WHO CONTINUE TO BE HARMED EACH DAY, THE UNITED STATES IS EAGER TO PROCEED TO THAT TRIAL EXPEDITIOUSLY.

REVISITING AN ARGUMENT THAT THIS COURT HAS ALREADY ADDRESSED AND PROPERLY DISPOSED OF, THE STATE FIRST ASSERTS THAT THE UNITED STATES HAS FAILED TO ESTABLISH ARTICLE III STANDING. BECAUSE THE UNITED STATES CAN SHOW ALL THREE ELEMENTS OF ARTICLE III STANDING -- INJURY IN FACT, TRACEABILITY, AND REDRESSABILITY -- THIS COURT SHOULD REJECT THE STATE'S ARGUMENTS.

THE SUPREME COURT'S DECISION IN VERMONT AGENCY OF NATURAL RESOURCES MAKES CLEAR THAT THE UNITED STATES SUFFERS AN INJURY TO ITS SOVEREIGNTY WHENEVER ITS LAWS ARE VIOLATED. BECAUSE THE UNITED STATES HAS ALLEGED AND AMASSED EXTENSIVE EVIDENCE SHOWING THE STATE OF GEORGIA IS VIOLATING THE ADA, THAT INJURY ALONE IS SUFFICIENT TO SATISFY ARTICLE III STANDARDS. THE UNITED STATES NEED NOT SHOW THAT AFFECTED STUDENTS HAVE ALSO SUFFERED AN INJURY IN FACT.

DESPITE THE STATE'S EFFORTS TO DISTORT THE MEANING OF VERMONT AGENCY, A CLEAR READING OF THAT CASE SHOWS THAT THE SUPREME COURT SQUARELY CONSIDERED WHETHER AN INJURY TO THE UNITED STATES SOVEREIGNTY MEETS THE REQUIREMENTS OF ARTICLE III FOR PURPOSES OF A CIVIL ACTION. IT CONCLUDED THAT IT DOES.

AND NOTHING ABOUT THE FLORIDA DECISION THE STATE REFERENCES CHANGES THAT, ESPECIALLY GIVEN THAT THAT CASE ADDRESSES STATUTORY STANDING, NOT CONSTITUTIONAL STANDING.

IN ANY EVENT, EVEN SETTING ASIDE THE INJURY TO ITS SOVEREIGNTY, THE UNITED STATES ALSO SATISFIES THE REQUIREMENTS OF ARTICLE III STANDING BASED ON THE VOLUMINOUS EVIDENCE IT HAS DEVELOPED OF THE REAL, CONCRETE, AND IMMINENT HARMS THAT CHILDREN IN GEORGIA EXPERIENCE AS A RESULT OF THE STATE'S UNLAWFUL RELIANCE ON THE GNETS PROGRAM. THERE CAN BE NO QUESTION THAT THE UNNECESSARY SEGREGATION, ISOLATION, AND DENIAL OF OPPORTUNITY THAT CHILDREN IN THE GNETS PROGRAM SUFFER CONSTITUTE COGNIZABLE INJURIES UNDER TITLE II AND OLMSTEAD.

THE STATE'S INSISTENCE THAT THE UNITED STATES PRESENT MORE DETAILED INDIVIDUALIZED EVIDENCE OF THOSE INJURIES CONFUSES ITS BROADER ARGUMENT ABOUT A PLAINTIFF'S PRIMA FACIE BURDEN IN AN OLMSTEAD CASE, WHICH MY COLLEAGUE WILL ADDRESS SHORTLY, WITH THE STANDARD FOR ESTABLISHING ARTICLE III STANDING.

THE STATE FARES NO BETTER IN EXTENDING ITS ARGUMENTS ABOUT ARTICLE III STANDING TO THE HARMS THAT STUDENTS AT

SERIOUS RISK OF PLACEMENT IN THE GNETS PROGRAM EXPERIENCE. THE UNDISPUTED EXPERT EVIDENCE IN THIS CASE SHOWS THAT STUDENTS ROUTINELY ENTER THE GNETS PROGRAM WITHOUT RECEIVING THE KINDS OF THERAPEUTIC SERVICES AND SUPPORTS THAT WOULD HELP THEM REMAIN IN MORE INTEGRATED LEARNING ENVIRONMENTS. THAT LACK OF SERVICES AND REPORTS PUTS MANY MORE STUDENTS AT RISK, AT SERIOUS RISK, OF BEING SEGREGATED IN THE GNETS PROGRAM.

THEIR INJURIES ARE NO LESS REAL OR CONCRETE BECAUSE THEY ARE NOT YET IN THE GNETS PROGRAM. INDEED, IF INDIVIDUALS WITH DISABILITIES WERE FORCED TO SUFFER THE SIGNIFICANT HARM OF SEGREGATION BEFORE THEY COULD SEEK RELIEF, OLMSTEAD'S PROHIBITION ON UNNECESSARY SEGREGATION WOULD BE HOLLOW.

THE SECOND AND THIRD ELEMENTS OF ARTICLE III STANDING, WHICH CONCERN TRACEABILITY AND REDRESSABILITY, ARE, AS OPPOSING COUNSEL NOTED, INEXTRICABLY LINKED TO THE STATE OF GEORGIA'S CONTROL AND ADMINISTRATION OF THE GNETS PROGRAM, WHICH WE WILL ADDRESS LATER THIS MORNING IN THE CONTEXT OF THE UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT. FOR NOW IT SUFFICES TO SAY THAT THIS COURT HAS ALREADY REJECTED THE STATE'S ARGUMENT THAT THE HARM AT ISSUE IN THIS CASE IS INDEPENDENTLY CAUSED BY AND CAN ONLY BE REMEDIED BY THIRD PARTIES. BECAUSE THE RECORD DEVELOPED IN DISCOVERY FULLY SUPPORTS THE ALLEGATIONS CONTAINED IN THE UNITED STATES' COMPLAINT, THE STATE HAS GIVEN THIS COURT NO GOOD REASON TO RULE OTHERWISE NOW THAT DISCOVERY HAS CLOSED.

THE SECOND ARGUMENT THE STATE ADVANCES IN ITS EFFORTS TO PREVENT THIS CASE FROM PROCEEDING TO TRIAL IS THAT THE UNITED STATES FAILS TO POINT TO ANY EVIDENCE DEMONSTRATING DISCRIMINATORY INTENT WHICH THE STATE ASSERTS IS A REQUIRED PART OF THE UNITED STATES' UNEQUAL EDUCATIONAL OPPORTUNITIES CLAIM. THE STATE'S ASSERTION IS SQUARELY AT ODDS WITH THE IMPLEMENTING REGULATIONS FOR TITLE II AND FINDS NO SUPPORT IN RELEVANT CASE LAW.

A PROPER READING OF THE RELEVANT CASE LAW MAKES CLEAR THAT THE INTENT REQUIREMENT THE STATE CITES IS AN ADDITIONAL HURDLE BEYOND PROVING THE ELEMENTS OF A PRIMA FACIE TITLE II CLAIM THAT APPLIES ONLY WHEN A PARTY SEEKS MONETARY DAMAGES. THE ELEVENTH CIRCUIT MADE THIS DISTINCTION CLEAR IN SILVERMAN VERSUS MIAMI DADE TRANSIT NOTING, QUOTE, IN AN ORDINARY COURSE, PROOF OF A TITLE II OR SECTION 504 VIOLATION ENTITLES A PLAINTIFF ONLY TO INJUNCTIVE RELIEF. TO GET DAMAGES, AS SILVERMAN SEEKS HERE, A PLAINTIFF MUST CLEAR AN ADDITIONAL HURDLE. HE MUST PROVE THAT THE ENTITY THAT HE HAS SUED ENGAGED IN INTENTIONAL DISCRIMINATION, WHICH REQUIRES A SHOWING OF DELIBERATE INDIFFERENCE, END QUOTE.

BECAUSE THE UNITED STATES DOES NOT SEEK MONETARY DAMAGES IN THIS CASE, IT NEED NOT CLEAR THE ADDITIONAL HURDLE OF SHOWING INTENTIONAL DISCRIMINATION DESCRIBED BY THE ELEVENTH CIRCUIT. THE TEXT OF THE TITLE II REGULATIONS AND THE LEGISLATIVE HISTORY OF THE ADA ITSELF CONFIRM THAT THE ADA

PRESCRIBES MORE THAN JUST INTENTIONAL DISCRIMINATION.

28 C.F.R. SECTION 35.130(B)(3) EXPRESSLY PROHIBITS PUBLIC ENTITIES FROM UTILIZING METHODS OF ADMINISTRATION THAT HAVE THE EFFECT OF SUBJECTING QUALIFIED INDIVIDUALS TO DISCRIMINATION. THE STATE FINDS NO PRECEDENT SUPPORTING THE VIEW THAT SUCH DISCRIMINATORY EFFECTS ARE NOT ACTIONABLE UNDER THE ADA. AND SUCH PRECEDENT WOULD BE SURPRISING, GIVEN THE OBSERVATION BY NUMEROUS COURTS THAT THE ADA IS ALSO AN ATTEMPT TO REMEDY THE EFFECTS OF, QUOTE, BENIGN NEGLECT RESULTING FROM INVISIBILITY OF THE DISABLED.

FINALLY, THE STATE PRESSES THIS COURT TO DEPART FROM ITS PRIOR DECISIONS AND HOLD THAT THE UNITED STATES' CLAIMS IN THIS CASE CANNOT PROCEED BECAUSE THEY ARISE UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, OR THE I.D.E.A. WHATEVER THE REASON FOR THE STATE'S ARGUMENTS REGARDING THE I.D.E.A., THE GUIDING QUESTION FOR THIS COURT IS THE SAME. AND THAT IS THE QUESTION IDENTIFIED IN FRY VERSUS NAPOLEON, WHETHER THE GRAVAMEN OF THE UNITED STATES' CLAIM IS A DENIAL OF A FREE AND APPROPRIATE PUBLIC EDUCATION, OR FAPE. AS THE UNITED STATES MAKES CLEAR IN ITS BRIEFING AND AS THIS COURT PREVIOUSLY DETERMINED AT THE MOTION-TO-DISMISS STAGE, THE ANSWER TO THIS QUESTION IS NO.

THE UNITED STATES' CLAIM CHALLENGES THE STATE'S SYSTEMIC DISCRIMINATION OF A CATEGORY OF STUDENTS: HERE, STUDENTS WITH BEHAVIOR-RELATED DISABILITIES. THAT SYSTEMIC

DISCRIMINATION STIGMATIZES THOSE STUDENTS. IT SEGREGATES THEM WITHOUT JUSTIFICATION. IT DENIES THEM EQUAL ACCESS TO PUBLIC INSTITUTIONS. AND IT DEPRIVES THEM OF THE ADVANTAGES THAT COME FROM INTEGRATED LEARNING ENVIRONMENTS IN WAYS THAT ARE DISTINCT FROM THE BREACH OF THE REQUIREMENTS OF THE I.D.E.A.

TO THE EXTENT THE STATE CITES A SINGLE STATEMENT FROM THE UNITED STATES' 27-PAGE COMPLAINT CONCERNING THE GNETS PROGRAM'S WIDESPREAD ABSENCE OF GRADE-LEVEL INSTRUCTION AS EVIDENCE THAT THE UNITED STATES' UNEQUAL EDUCATIONAL OPPORTUNITY CLAIM ARISES UNDER THE I.D.E.A., THE STATE'S SELECTIVE READING SHOULD BE REJECTED.

THE UNITED STATES' COMPLAINT ALLEGES A LITANY OF WAYS THAT THE STATE'S GNETS PROGRAM DISCRIMINATES AGAINST STUDENTS PLACED IN THE PROGRAM, INCLUDING, AMONG OTHER THINGS, GNETS' USE OF INFERIOR FACILITIES, ITS LACK OF INSTRUCTION FROM CERTIFIED TEACHERS, AND ITS LACK OF CO-CURRICULAR OPPORTUNITIES. THESE ALLEGATIONS, WHICH THE FACTUAL RECORD DEVELOPED THROUGH DISCOVERY NOW FULLY SUPPORTS, MAKE OUT A VIOLATION OF TITLE II'S REQUIREMENT OF NONDISCRIMINATORY ACCESS TO PUBLIC INSTITUTIONS DISTINCT FROM ANY VIOLATION OF FAPE.

I NOTE, YOUR HONOR, THAT A FEW MOMENTS AGO, THE STATE ALSO REFERENCED A NUMBER OF HYPOTHETICAL QUESTIONS THAT ARE IDENTIFIED IN FRY AS A METHOD FOR HELPING A COURT IDENTIFY WHEN A CLAIM MIGHT ARISE UNDER THE I.D.E.A. AND I'LL JUST NOTE THAT THERE'S NOTHING MAGICAL ABOUT THOSE HYPOTHETICAL QUESTIONS.

THEY ARE QUESTIONS THAT THE COURT IDENTIFIED. BUT IN OTHER CASES, COURTS HAVE NOTED THAT SOMETIMES THOSE QUESTIONS ARE NOT A PERFECT FIT. AND I'LL NOTE THAT, EVEN WITHIN THE ELEVENTH CIRCUIT, THAT THAT HAS BEEN THE CASE. IN THE J.S. VERSUS HOUSTON COUNTY BOARD OF EDUCATION CASE, 877 F.3D 979, THE COURT IS ASKING THE SAME QUESTION. AND THAT IS A CASE THAT DOES ARISE IN THE EDUCATION CONTEXT. AND THE COURT THERE FOUND THAT THOSE HYPOTHETICAL QUESTIONS MIGHT NOT BE A PARTICULARLY GOOD FIT.

SO WE WOULD NOTE FOR YOUR HONOR THAT THOSE QUESTIONS ARE NOT MAGICAL IN SOME WAY AND THAT IF THEY DON'T APPLY, A CASE NECESSARILY ARISES UNDER FAPE, AND WOULD DIRECT YOUR HONOR TO -- TO THAT ELEVENTH CIRCUIT CASE LAW.

I'LL NOW TURN IT OVER TO MY COLLEAGUE TO ADDRESS THE STATE'S SUBSTANTIVE OLMSTEAD CLAIM.

THE COURT: THANK YOU, MA'AM.

MS. POLANSKY: MAY IT PLEASE THE COURT, JESSICA POLANSKY FOR THE UNITED STATES. I WILL BE ADDRESSING WHY THE UNITED STATES' OLMSTEAD CLAIM SURVIVES GEORGIA'S MOTION FOR SUMMARY JUDGMENT. TO DEFEAT THE STATE'S MOTION, WE SIMPLY MUST DEMONSTRATE THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO EACH ELEMENT OF OUR PRIMA FACIE CASE.

THE UNITED STATES HAS EASILY SURPASSED THAT BAR. SPECIFICALLY WE HAVE PUT FORWARD AND EVIDENCE DEMONSTRATING THAT CHILDREN IN GNETS CAN APPROPRIATELY BE SERVED IN MORE

INTEGRATED SETTINGS, THAT THEIR PARENTS AND GUARDIANS DO NOT OPPOSE PLACEMENT IN MORE INTEGRATED SETTINGS, AND THAT THE STATE CAN REASONABLY MODIFY ITS SYSTEM TO ACCOMPLISH THIS.

I WOULD LIKE TO LOG THROUGH EACH ELEMENT OF OUR PRIMA FACIE CASE IN MORE DETAIL. FIRST, THE UNITED STATES HAS PUT FORWARD SUBSTANTIAL EVIDENCE THAT THE VAST MAJORITY OF CHILDREN CURRENTLY IN GNETS COULD BE APPROPRIATELY SERVED IN MORE INTEGRATED SETTINGS, SUCH AS THEIR COMMUNITY SCHOOLS. THE UNITED STATES' EXPERT, DR. AMY MCCART, PROVIDED EVIDENCE ABOUT APPROPRIATENESS. YOU WILL HEAR MORE ABOUT HER REVIEW LATER, AS WELL AS HER EXPERTISE IN THE FIELD OF SPECIAL EDUCATION AND HER DECADES OF EXPERIENCE ADVISING STATES AND SCHOOL DISTRICTS ON HOW TO SUPPORT INTEGRATED BEHAVIORAL SERVICES TO CHILDREN WITH DISABILITIES.

DR. MCCART'S REVIEW IS EXTENSIVE. OVER THE COURSE OF THREE YEARS, SHE VISITED 70 GNETS SITES WHERE SHE OBSERVED NEARLY 1,000 STUDENTS AND HUNDREDS OF CLASSROOMS. DR. MCCART ALSO REVIEWED THE RECORDS OF APPROXIMATELY 500 STUDENTS IN GNETS, AND SHE ATTENDED OR REVIEWED THE TESTIMONY FROM DEPOSITIONS OF NUMEROUS REGIONAL GNETS PROGRAM DIRECTORS.

BASED ON HER COMPREHENSIVE REVIEW, DR. MCCART FOUND THAT JUST A HANDFUL OF STUDENTS WOULD BE -- CURRENTLY IN GNETS ARE APPROPRIATE FOR SEGREGATED SETTINGS. FOR THE LARGE REMAINDER, DR. MCCART FOUND THAT THOSE STUDENTS COULD MORE APPROPRIATELY BE SERVED IN A MORE INTEGRATED EDUCATIONAL

SETTING.

BEYOND DR. MCCART'S REVIEW, THERE IS SIGNIFICANT EVIDENCE THAT SUPPORTS THIS FINDING, INCLUDING STUDENT RECORDS, PARENT STATEMENTS, AND RECORDS FROM IEP MEETINGS. IN ONE EXAMPLE, A STUDENT PSYCHIATRIST WROTE TO A GNETS DIRECTOR NOTING THAT THE STUDENT, QUOTE, NEEDS TO BE MAINSTREAMED, UNQUOTE.

IN ANOTHER EXAMPLE, A PARENT FILED A FORMAL COMPLAINT WITH THE STATE'S DEPARTMENT OF EDUCATION TO CHALLENGE HER SON'S PLACEMENT IN GNETS. THE COMPLAINT RECOUNTED THAT HER SON WAS LOSING A SIGNIFICANT AMOUNT OF INSTRUCTIONAL TIME AT THE GNETS SITE, AS THE SITE THAT HE WAS PLACED AT WAS ONLY OPEN FOUR DAYS A WEEK, THAT HER SON HAD BEEN PHYSICALLY RESTRAINED BY STAFF IN THE GNETS PROGRAM, AND THAT HE WAS NOT ABLE TO PARTICIPATE IN FIELD TRIPS OR GO TO THE LIBRARY OR TO LUNCH WITH NONDISABLED PEERS.

AFTER FILING LITIGATION, THE PARENT FINALLY SUCCEEDED IN GETTING HER SON OUT OF GNETS. THE UNITED STATES IS PREPARED TO SHOW AT TRIAL THAT HER SON IS NOW IN GENERAL EDUCATION CLASSES FOR SCIENCE, SOCIAL STUDIES, AND SPECIALS, AND THAT HE PARTICIPATES IN SCHOOL ACTIVITIES WITH HIS PEERS, SUCH AS ATHLETICS AND THE 4-H CLUB. THESE ARE TWO EXAMPLES. BUT THERE, OF COURSE, ARE OTHERS.

IN ADDITION, GNETS IS SERVING CHILDREN WHO ARE NOT APPROPRIATE FOR THE PROGRAM AND WHO DO NOT RECEIVE THE SERVICES

THAT THEY NEED THERE. FIRST, ALTHOUGH GNETS IS NOT INTENDED TO SERVE CHILDREN WITH INTELLECTUAL DISABILITIES, MORE THAN TEN PERCENT OF THE STUDENTS IN GNETS HAVE AN INTELLECTUAL DISABILITY OR A RELATED CONDITION. GEORGIA'S DIRECTOR OF SPECIAL EDUCATION TESTIFIED THAT GNETS IS CATEGORICALLY INAPPROPRIATE TO MEET THE NEEDS OF THESE STUDENTS, AS DID A GNETS REGIONAL PROGRAM DIRECTOR.

SECOND, GNETS PROGRAMS OFTEN DO NOT PROVIDE THE THERAPEUTIC SERVICES. GEORGIA REQUIRED GNETS PROGRAMS TO REVIEW THE FILES OF EVERY STUDENT IN THEIR PROGRAM TO ASSESS THE SERVICES THAT STUDENTS WERE RECEIVING. HOWEVER, MANY OF THESE REVIEWS, WHICH WERE CONDUCTED BY THE GNETS REGIONAL DIRECTORS THEMSELVES OF THEIR OWN PROGRAMS, DETERMINED THAT STUDENTS WERE NOT RECEIVING ANY THERAPEUTIC SERVICES IN GNETS, EVEN THOUGH THAT IS THE VERY PURPOSE OF THE PROGRAM.

DR. MCCART'S REVIEW CORROBORATED THIS, FINDING THAT THERE IS A GROSS LACK OF THE MENTAL HEALTH AND THERAPEUTIC EDUCATIONAL SERVICES AT GNETS THAT IT PURPORTS TO PROVIDE. ACCORDINGLY, IT IS DIFFICULT TO SEE HOW GNETS COULD BE AN APPROPRIATE PLACEMENT FOR ANY STUDENT.

THE STATE MAKES TWO ARGUMENTS AGAINST THE UNITED STATES' FINDINGS, BOTH OF WHICH SHOULD BE REJECTED.

FIRST, THE STATE ARGUES THAT, QUOTE, A RESPONSIBLE TREATING PHYSICIAN MUST MAKE THE DETERMINATION WHETHER STUDENTS CAN APPROPRIATELY RECEIVE SERVICES IN COMMUNITY SCHOOLS. THIS

IS A REHASH OF AN ARGUMENT THAT THE STATE PREVIOUSLY MADE ABOUT STATE TREATING PROFESSIONALS AND THAT THIS COURT PREVIOUSLY REJECTED. PERPLEXINGLY, THE STATE CONTENDS THAT THIS COURT'S PRIOR ORDER ABOUT WHETHER A RECOMMENDATION FROM A TREATING PHYSICIAN IS REQUIRED, QUOTE, IS NOT CONTROLLING, GIVEN THE DIFFERENT STANDARD OF REVIEW, UNQUOTE.

BUT THE STATE PROVIDES NO SUPPORT FOR ITS NOVEL PROPOSITION THAT A LEGAL FINDING AT THE MOTION-TO-DISMISS STAGE WOULD NOT APPLY LATER IN THE CASE. THIS COURT HAS ALREADY CORRECTLY FOUND THAT A STATE TREATING PROFESSIONAL'S OPINION IS NOT REQUIRED, AND THE WEIGHT OF AUTHORITY MAKES CLEAR THAT A TREATING PROFESSIONAL, WHETHER EMPLOYED BY THE STATE OR NOT, IS NOT REQUIRED TO MAKE THE APPROPRIATENESS DETERMINATION.

AND IT IS NONSENSICAL IN THIS CONTEXT TO REQUIRE A PHYSICIAN'S DETERMINATION WHEN STUDENTS' EDUCATIONAL PLACEMENTS ARE DETERMINED BY IEP TEAMS BUT NOT BY PHYSICIANS.

YOUR HONOR, OPPOSING COUNSEL REFERENCED THE ELEVENTH CIRCUIT'S EARLIER DECISION IN FLORIDA. THAT REFERENCE IS UNAVAILING. THAT OPINION DID NOT ADDRESS WHETHER A DETERMINATION BY A TREATING PHYSICIAN WAS REQUIRED. THAT ELEVENTH CIRCUIT EXAMINED WHETHER THE UNITED STATES HAD THE AUTHORITY TO BRING A TITLE II CLAIM BUT DID NOT INQUIRE WHETHER A TREATING PROFESSIONAL'S OPINION WAS REQUIRED AND SIMPLY CITED LANGUAGE FROM OLMSTEAD.

GOING TO THE STATE'S SECOND ARGUMENT, THE STATE

ARGUES THAT THE UNITED STATES HAS NOT PROVIDED SUFFICIENTLY INDIVIDUALIZED EVIDENCE ABOUT EACH STUDENT'S NEEDS TO SET OUT OUR PRIMA FACIE CASE. THAT IS NOT THE CASE.

OTHER COURTS CONSIDERING OLMSTEAD HAVE RELIED ON A VARIETY OF SOURCES OF EVIDENCE TO DEMONSTRATE APPROPRIATENESS. COURTS HAVE DETERMINED THAT PLAINTIFFS ESTABLISH APPROPRIATENESS BASED ON EVIDENCE THAT THEY HAD PREVIOUSLY RECEIVED SERVICES IN INTEGRATED SETTING OR THAT OTHER INDIVIDUALS WITH SIMILAR DISABILITIES WERE CURRENTLY RECEIVING SERVICES IN INTEGRATED SETTINGS. FOR EXAMPLE, IN D-A-I VERSUS PATTERSON, THE COURT CREDITED EVIDENCE SIMILAR TO THE EVIDENCE THE UNITED STATES HAS PUT FORWARD, SUCH AS AN EXPERT REVIEW VERY SIMILAR TO DR. MCCART'S, WHICH UTILIZED A MIX OF RECORD REVIEWS, IN-PERSON OBSERVATIONS, AND VISITS. THE COURT ALSO CREDITED A STATE OFFICIAL, EVEN THOUGH SHE DID NOT DO A HOUSING ASSESSMENT FOR SPECIFIC RESIDENTS OR REVIEW THEIR TREATMENT RECORDS, AND ALSO CREDITED A WORK GROUP THAT DETERMINED THAT A SIGNIFICANT NUMBER OF RESIDENTS COULD MOVE TO MORE INTEGRATED SETTINGS, EVEN THOUGH THAT WORK GROUP DID NOT LOOK AT CLINICAL DATA ABOUT THOSE INDIVIDUALS. RATHER, THE WORK GROUP'S PROPOSAL WAS BASED ON ITS FINDINGS, QUOTE, THAT THESE RESIDENTS HAD SIMILAR CHARACTERISTICS TO INDIVIDUALS LIVING MORE INDEPENDENTLY, UNQUOTE.

THESE ARE ALL ACCEPTABLE METHODS OF DEMONSTRATING APPROPRIATENESS AND COMPORT WITH THE UNITED STATES' EVIDENCE.

AND, ADDITIONALLY, THE UNITED STATES HAS PRESENTED OTHER EVIDENCE SHOWING THAT INDIVIDUAL STUDENTS COULD APPROPRIATELY BE SERVED IN MORE INTEGRATED SETTINGS. AND THIS EVIDENCE INCLUDES DOCUMENTATION FROM TREATING PHYSICIANS, IEP'S, AND EVIDENCE THAT STUDENTS SUCCEEDED IN COMMUNITY EDUCATIONAL PLACEMENTS ONCE PARENTS SUCCESSFULLY DEMANDED THE STUDENTS LEAVE THE GNETS PROGRAM.

YOUR HONOR, THIS CASE IS NO DIFFERENT THAN OTHER OLMSTEAD CASES THAT HAVE FOUND THAT THE CASE WAS SUSCEPTIBLE TO SYSTEMIC PROOF. FOR EXAMPLE, IN KENNETH R. VERSUS HASSAN, THE COURT FOUND THAT THE PLAINTIFFS MET -- IN CONSIDERING CLASS CERTIFICATION, THE COURT FOUND THAT THE PLAINTIFFS MET THE COMMONALITY REQUIREMENT, NOTING THAT THERE WAS SUBSTANTIAL EVIDENCE THAT THE STATE'S POLICIES AND PRACTICES CREATED A SYSTEMIC DEFICIENCY IN THE AVAILABILITY OF COMMUNITY-BASED MENTAL HEALTH SERVICES -- AND I WOULD POINT OUT THAT THIS IS ALSO A MENTAL HEALTH OLMSTEAD CASE -- AND THAT THE DEFICIENCY IS THE SOURCE OF HARM ALLEGED BY ALL CLASS MEMBERS.

SIMILARLY, THE COURT SPECIFICALLY LOOKED -- CONSIDERED AN AT-RISK CLAIM IN THAT SAME ORDER AND NOTED THAT, IN FACT, THE CASE LAW DEMONSTRATED THAT NO INDIVIDUALIZED INQUIRIES NEED TO BE MADE TO DETERMINE WHETHER A SYSTEMIC CONDITION PLACES CLASS MEMBERS AT SERIOUS RISK OF UNNECESSARY INSTITUTIONALIZATION AND, INSTEAD, THE INQUIRY CAN PROPERLY TURN ON SYSTEMWIDE PROOF.

THIS IS SIMILAR HERE. THE THIRD CIRCUIT HAS FOUND THE SAME IN FREDERICK L., WHERE IT NOTED THAT ONE-THIRD OF THE PLAINTIFFS WERE QUALIFIED FOR COMMUNITY-BASED SERVICES, AND A LARGER PORTION HAD EXPRESSED INTEREST IN BEING PLACED IN COMMUNITY CARE. BUT THERE WAS NOT AN ASSERTION THAT THERE NEEDED TO BE A 100-PERCENT SHOWING. AND THIS ACCORDS AS WELL WITH HERE.

THE UNITED STATES HAS DEMONSTRATED A GENUINE ISSUE OF MATERIAL FACT ON THE APPROPRIATENESS PRONG AND ITS CLAIM SHOULD BE ALLOWED TO PROCEED.

NEXT, THE UNITED STATES HAS DEMONSTRATED THAT PARENTS AND GUARDIANS ARE NOT OPPOSED TO THEIR CHILDREN LEAVING GNETS AND MOVING TO MORE INTEGRATED EDUCATIONAL SETTINGS. THE RECORD EVIDENCE IS MORE THAN ADEQUATE TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO THIS ELEMENT OF OUR PRIMA FACIE CASE AS WELL. GEORGIA SUGGESTS THAT THE UNITED STATES IS REQUIRED TO SHOW THAT STUDENTS' FAMILIES PREFER AN INTEGRATED SETTING. BUT THIS IS NOT THE STANDARD. THE DEFAULT ESTABLISHED BY THE AMERICANS WITH DISABILITIES ACT AND OLMSTEAD IS THAT INDIVIDUALS SHOULD BE IN A MORE INTEGRATED SETTING UNLESS THEY OPT AGAINST IT.

EVEN IF AN EXPRESS PREFERENCE WERE THE STANDARD, THE UNITED STATES HAS PUT FORWARD EVIDENCE TO SHOW THAT NUMEROUS PARENTS HAVE EXPLICITLY OBJECTED TO THEIR CHILDREN'S PLACEMENT IN GNETS AND SEEK MORE INTEGRATED EDUCATIONAL PLACEMENT. WE

HAVE EXAMPLES IN THE RECORD DOCUMENTING THIS.

MOREOVER, THE UNITED STATES HAS PUT FORWARD EVIDENCE THAT PARENTS HAVE BEEN TOLD THAT THE ONLY OPTION FOR THEIR CHILD IS A GNETS PROGRAM AND DENIED ANY ALTERNATIVES. THE STATE CANNOT REASONABLY CLAIM THAT PARENTS OPPOSE COMMUNITY PLACEMENT WHEN THEY WERE NEVER PROVIDED INFORMATION OR REALISTIC COMMUNITY ALTERNATIVES TO MAKE AN INFORMED CHOICE IN THE FIRST PLACE. OTHER COURTS HAVE FOUND THE SAME.

FINALLY, GEORGIA ASSERTS THAT THE UNITED STATES' EVIDENCE IS TOO LIMITED. BUT THIS IS INCORRECT. THE UNITED STATES DID NOT MOVE FOR SUMMARY JUDGMENT. THE STATE DID. THE UNITED STATES HAS NOT PUT FORWARD ALL OF THE EVIDENCE THAT WE INTEND TO MARSHAL FOR TRIAL. WE SIMPLY PROVIDED A FEW ILLUSTRATIVE EXAMPLES OF FAMILIES DEMONSTRATING THAT THEY DO NOT OPPOSE, AND IN SOME INSTANCES, AFFIRMATIVELY REQUEST THAT THEIR CHILD BE MOVED FROM GNETS TO A MORE INTEGRATED EDUCATIONAL SETTING.

THE STATE, BY CONTRAST, HAS PUT FORWARD NO EVIDENCE DEMONSTRATING THAT THERE ARE FAMILIES THAT, IN FACT, DO OPPOSE COMMUNITY PLACEMENT. THE UNITED STATES' SHOWING IS SUFFICIENT TO DEFEAT THE STATE'S MOTION FOR SUMMARY JUDGMENT ON THIS ELEMENT.

THE FINAL PRONG OF AN OLMSTEAD CLAIM IS WHETHER COMMUNITY-BASED SERVICES CAN BE REASONABLY ACCOMMODATED, TAKING INTO ACCOUNT THE RESOURCES AVAILABLE TO THE STATE AND THE NEEDS

OF OTHER PERSONS WITH DISABILITIES. THE UNITED STATES HAS PUT FORWARD EXTENSIVE EVIDENCE ABOUT THE MODIFICATIONS IT SEEKS AND ESTABLISHING THAT THOSE PROPOSED MODIFICATIONS ARE REASONABLE.

THE STATE CONTESTS THE REASONABLENESS OF THESE FOUR MODIFICATIONS. HOWEVER, THE STATE ITSELF HAS ADOPTED OR ENDORSED THE BULK OF THESE MEASURES ALREADY. FIRST, GEORGIA ALREADY PROVIDES THE CORE INTEGRATED THERAPEUTIC SERVICES AND SUPPORTS THAT OUR EXPERT, DR. PUTNAM, RECOMMENDS TO EXPAND TO PREVENT UNNECESSARY SEGREGATION IN GNETS.

DESPITE MR. BELINFANTE'S SUGGESTION, THE UNITED STATES IS NOT ASKING FOR THE CREATION OF NEW SERVICES. RATHER, WE ARE REQUESTING THAT THE STATE PROVIDE EXISTING SERVICES IN SUFFICIENT AMOUNTS SO THAT ALL STUDENTS WHO NEED THEM CAN GET THEM BEFORE THEY GET SENT TO A SEGREGATED SETTING LIKE GNETS.

SECOND, WE PROPOSE THAT GEORGIA ABIDE BY ITS OWN STANDARDS WHICH IT HAS PUT IN ITS CONTRACTS AND REQUIRES OF ITS PROVIDERS.

THIRD, WE ARE ASKING FOR TRAINING FOR SCHOOL PERSONNEL TO HELP THEM SUPPORT STUDENTS WITH BEHAVIORAL NEEDS IN COMMUNITY SETTINGS.

AND, FINALLY, WE ARE ASKING THE STATE TO IMPLEMENT THE ACTIONS IT HAS ALREADY COMMITTED TO TAKE IN A SYSTEM OF CARE PLAN THAT IT HAS FAILED THUS FAR TO EXECUTE. THESE ARE OBJECTIVELY REASONABLE, AND IN LARGE PART, ARE THINGS THAT THE STATE ALREADY PURPORTS TO BE DOING.

THE UNITED STATES' BURDEN IS NOT HIGH. ONCE THE PLAINTIFF ASSERTING AN OLMSTEAD CLAIM PUTS FORWARD, QUOTE, THE EXISTENCE OF A PLAUSIBLE ACCOMMODATION, THE COST OF WHICH FACIALLY DO NOT CLEARLY EXCEED ITS BENEFITS, SHE HAS MADE OUT A PRIMA FACIE SHOWING, AND THE RISK OF NONPERSUASION FALLS ON THE DEFENDANT.

THE UNITED STATES HAS SUGGESTED SEVERAL VIABLE APPROACHES THAT GEORGIA COULD ADOPT. THIS IS SUFFICIENT TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT ON THIS POINT.

GEORGIA ALSO ARGUES THAT THE UNITED STATES HAS NOT PUT FORWARD EVIDENCE ABOUT THE COST OR WORKFORCE IMPLICATIONS OF ITS PROPOSED MODIFICATIONS. GEORGIA IS ENTITLED TO PUT FORWARD EVIDENCE THAT THE MODIFICATIONS WE PROPOSE WOULD CONSTITUTE A FUNDAMENTAL ALTERATION, BUT THAT IS NOT A PART OF THE PLAINTIFF'S PRIMA FACIE CASE. NUMEROUS COURTS HAVE AFFIRMED THIS PRINCIPLE.

YOUR HONOR, THIS ISSUE WILL ALSO COME UP IN THE MOTION TO EXCLUDE THE AFFIDAVIT OF MR. MCKAY. WE WOULD ARGUE THAT THAT AFFIDAVIT WAS IMPROPER. AND THE COURT WILL HEAR SEPARATE ARGUMENT ABOUT THAT. HOWEVER, THE ASSUMPTIONS IN THE AFFIDAVIT ARE INCORRECT THAT CERTAIN SERVICES THE APEX PROGRAM WOULD NEED TO BE EXPANDED TO ALL SCHOOLS, BUT THAT WAS NOT WHAT WE PROPOSED.

ACCORDINGLY, THE PREMISE FOR THAT ESTIMATE IS FAULTY. AND, IN FACT, OUR EXPERT FOUND THAT GEORGIA CAN TAP INTO

SUBSTANTIAL FEDERAL RESOURCES AVAILABLE THROUGH MEDICAID, WHICH PROVIDES AN ADDITIONAL ALMOST TWO DOLLARS IN FEDERAL FUNDS FOR EVERY ONE DOLLAR THAT THE STATE PROVIDES, AND THAT IT COULD REDIRECT SUBSTANTIAL STATE FUNDS ALLOCATED FOR SEGREGATED PLACEMENTS, SUCH AS THE $53 MILLION THAT THE STATE RECENTLY COMMITTED TO GNETS.

THE AMERICANS WITH DISABILITIES ACT ESTABLISHES A CAREFUL BALANCE TO AVOID DISCRIMINATION WHILE ALSO PROVIDING STATES WITH THE FLEXIBILITY TO DETERMINE HOW TO MODIFY THEIR SYSTEM TO CURE THE LEGAL VIOLATION. THE UNITED STATES HAS CAREFULLY RESPECTED THAT BALANCE HERE. THE UNITED STATES IS NOT DICTATING PARTICULAR MODIFICATIONS. RATHER, WE HAVE PUT FORWARD PROPOSED MODIFICATIONS THAT ARE REASONABLE, THAT COMPORT WITH THE STATE'S OWN STANDARDS, AND THAT WOULD CURE THE STATE'S LEGAL VIOLATION. THIS IS SUFFICIENT TO MEET OUR BURDEN.

ACCORDINGLY, THE COURT SHOULD REJECT THE STATE'S MOTION FOR SUMMARY JUDGMENT.

THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT. REBUTTAL.

MR. BELINFANTE: YOUR HONOR, TWO THINGS ARE MOST IMPORTANT WHEN CONSIDERING THE UNITED STATES' ARGUMENT. THEY ARE MAKING A SYSTEMATIC CLAIM AND SEEKING SYSTEMATIC REMEDIES. AND THEY ARE RELYING ON INCIDENTS THAT HAPPENED ONCE OR TWICE IN A CASE WHERE OVER 782,000 DOCUMENTS HAVE BEEN PRODUCED.

THAT IS NOT THEIR MEETING THEIR BURDEN ON SUMMARY JUDGMENT TO SHOW SYSTEMIC VIOLATIONS.

WHEN IT COMES TO LOOKING AT THE OLMSTEAD CLAIM, THEY AGAIN RELY ON DR. MCCART'S CLAIM ABOUT THE VAST MAJORITY. YET THEY HAVE STILL NOT ANSWERED ANY ANALYSIS AS TO WHY OLMSTEAD ITSELF FOCUSES ON AN INDIVIDUALIZED CLAIM. THERE IS NO ANSWER. AND THE ELEVENTH CIRCUIT MADE THAT CLEAR.

AND IT WASN'T JUST DICTA, BECAUSE IN THE FINAL PARAGRAPH, THE JUDGE WROTE, THE SAME CONSIDERATIONS OF OLMSTEAD APPLY TO THE MERITS OF THIS CASE. AND THAT WAS IN DIRECT RESPONSE TO FLORIDA'S ARGUMENT ON FEDERALISM. AND JUSTICE KENNEDY POINTS TO THE NEED TO LOOK AT TREATMENT PROFESSIONALS AND INDIVIDUAL CARE TO RESOLVE FEDERALISM INTENTION.

AS IT RELATES TO PATTERSON THAT THEY RELY ON, ON OUR BRIEF, WE POINT OUT HOW THAT CASE HAS BEEN REVERSED, NEVER BEEN CITED BY AN APPELLATE COURT AND, IN THE DISTRICT COURT, IN UNITED STATES/MISSISSIPPI, RELIED ON THE SAME ARGUMENT IN PATTERN THE UNITED STATES ADVANCED HERE, AND THE FIFTH CIRCUIT REVERSED THEM. THE AT-RISK ANALYSIS STILL DOES NOT CONSIDER THE ARGUMENTS IN MISSISSIPPI AND THE IMPORTANT INTERVENING CASE OF KISOR.

ON THE NEED TO SHOW NON-OBJECTION, THE UNITED STATES AGAIN MISSES THAT THAT IS AN ELEMENT OF THEIR CASE. AND TO SHOW SYSTEMIC VIOLATIONS, THEY NEED TO SHOW MORE THAN TWO OR THREE PARENTS, ONE OF WHOM USED THE I.D.E.A. TO GET OUT OF

GNETS BECAUSE THAT WAS NOT APPROPRIATE.

FINALLY, ON REASONABLE ACCOMMODATION, THE COURT DID NOT HEAR ANY ANALYSIS ON BIRCOLL. AND THE ONLY PLEADING EVIDENCE WE'VE SEEN OF IT IS A FOOTNOTE SAYING, BIRCOLL DOESN'T REALLY MEAN THAT A CASE BY CASE IS NOT THERE. BUT THAT'S WHAT THE PRECEDENT SAYS.

I'LL CLOSE AGAIN WITH THE WORDS OF JUSTICE KENNEDY: QUESTIONS ABOUT INSTITUTIONALIZED TREATMENT CANNOT BE DECIDED IN THE ABSTRACT. AND THAT'S EXACTLY WHAT THE UNITED STATES SEEKS. AND THAT'S EXACTLY WHY SUMMARY JUDGMENT SHOULD BE GRANTED.

THE COURT: THANK YOU.

MR. BELINFANTE: THANK YOU.

THE COURT: ALL RIGHT. GIVE ME ONE QUICK BREAK TO CONFER WITH MS. BECK ABOUT SOMETHING.

(WHEREUPON, THERE WAS A PAUSE IN THE PROCEEDINGS.)

THE COURT: ALL RIGHT. ARE WE READY TO PROCEED ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT?

MS. WATSON: YES, YOUR HONOR.

THE COURT: ALL RIGHT. YOU MAY PROCEED.

MS. WATSON: I'D LIKE TO RESERVE FOUR MINUTES FOR REBUTTAL.

THE COURT: YOU'LL HAVE TO WATCH FOR THAT YOURSELF. BUT AS LONG AS YOU UNDERSTAND THAT, THAT'S FINE.

MS. WATSON: YES, YOUR HONOR.

THE COURT: OKAY. OR SOMEONE FROM YOUR TEAM.

MS. WATSON: OKAY.

MAY IT PLEASE THE COURT.

THE COURT: YES, MA'AM.

MS. WATSON: ANDREA HAMILTON WATSON FOR THE UNITED STATES.

THE UNITED STATES MOVES FOR PARTIAL SUMMARY JUDGMENT ON ONE DISCRETE ISSUE, WHETHER THE STATE OF GEORGIA ADMINISTERS THE GNETS PROGRAM AS A MATTER OF LAW AND IS, THEREFORE, SUBJECT TO THE INTEGRATION MANDATE OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT.

TO BE CLEAR, THIS IS NOT THE COURT'S FIRST TIME CONSIDERING THIS ISSUE. AT THE PLEADING STAGE, THIS COURT CONCLUDED, NOT ONCE, BUT TWICE, THAT THE UNITED STATES ADEQUATELY ALLEGED THAT THE STATE ADMINISTERS THE GNETS PROGRAM.

HAVING REACHED THE CLOSE OF DISCOVERY, THE QUESTION NOW IS WHETHER THE UNDISPUTED FACTUAL RECORD SUPPORTS THE ALLEGATIONS THAT THIS COURT PREVIOUSLY FOUND SUFFICIENT TO DEMONSTRATE THAT TRUE ADMINISTRATION OF THE GNETS PROGRAM RESTS WITH THE STATE. WE SUBMIT THAT IT DOES.

ALTHOUGH THE COURT HAS RECEIVED NUMEROUS PAGES OF BRIEFING AND SUPPORTING EVIDENCE FROM THE PARTIES, WE BELIEVE THAT INFORMATION CAN BE DISTILLED DOWN TO A FEW CORE TAKEAWAYS.

I WILL BEGIN BY WALKING THE COURT THROUGH KEY

UNDISPUTED FACTS THAT CONFIRM WHY THIS COURT CAN AND SHOULD RULE THAT THE STATE ADMINISTERS THE GNETS PROGRAM AS A MATTER OF LAW. THEN I WILL ADDRESS THE STATE'S ARGUMENTS OPPOSING OUR MOTION, INCLUDING THE STATE'S OBJECTIONS TO THE LEGAL STANDARD THAT THIS COURT APPROPRIATELY APPLIED AT THE PLEADINGS STAGE REGARDING STATE ADMINISTRATION.

TURNING TO OUR CORE ARGUMENT, THE UNITED STATES ASKS THIS COURT TO DISPOSITIVELY RULE THAT THE STATE OF GEORGIA ADMINISTERS THE GNETS PROGRAM AND IS SUBJECT TO TITLE II'S INTEGRATION MANDATE.

TITLE II'S IMPLEMENTED REGULATION, 28 C.F.R. SECTION 35.130(D), REQUIRES PUBLIC ENTITIES TO, QUOTE, ADMINISTER SERVICES, PROGRAMS, AND ACTIVITIES IN THE MOST INTEGRATED SETTING APPROPRIATE TO THE NEEDS OF QUALIFIED INDIVIDUALS WITH DISABILITIES, END QUOTE. THIS COURT PREVIOUSLY OUTLINED AND APPLIED THE STANDARD FOR ESTABLISHING THE STATE'S ADMINISTRATION OF THE GNETS PROGRAM AT THE PLEADINGS STAGE, IN BOTH ITS RULING ON THE STATE'S MOTION TO DISMISS AND THE STATE'S MOTION FOR JUDGMENT ON THE PLEADINGS. THIS COURT CONCLUDED THAT THE UNITED STATES HAD ARTICULATED SPECIFIC FACTS THAT EXPLAIN THE WAYS IN WHICH THE GEORGIA DEPARTMENT OF EDUCATION CONTROLS AND ADMINISTERS THE GNETS PROGRAM WITHIN THE MEANING OF TITLE II.

THIS COURT ALSO CONCLUDED THAT, AMONG OTHER THINGS, THE UNITED STATES HAD ALLEGED FOUR KEY ACTIONS UNDERTAKEN BY

THE STATE THAT WERE SUFFICIENT TO DEFEAT THE STATE'S MOTIONS.

FIRST, THAT THE STATE PROMULGATES REGULATIONS TO CARRY OUT THE GNETS PROGRAM.

SECOND, THAT THE STATE ESTABLISHES CRITERIA FOR THE IMPLEMENTATION OF THE PROGRAM.

THIRD, THAT THE STATE OVERSEES THE OPERATIONS AND IMPLEMENTATION OF THE PROGRAM THROUGHOUT THE STATE.

AND, FINALLY, THAT THE STATE DISBURSES FEDERAL AND STATE FUNDING TO SUPPORT THE GNETS PROGRAM.

USING THESE FOUR CATEGORIES FOR ILLUSTRATIVE PURPOSES TODAY, I'D LIKE TO WALK THE COURT THROUGH EACH ONE FRAMED AS A QUESTION TO DEMONSTRATE THAT NOW THAT DISCOVERY HAS ENDED, THE UNDISPUTED FACTS CONFIRM THE STATE'S ADMINISTRATION OF THE GNETS PROGRAM.

SO TURNING TO THAT FIRST QUESTION, DO THE UNDISPUTED FACTS SHOW THAT THE STATE PROMULGATES REGULATIONS TO CARRY OUT THE GNETS PROGRAM. THE ANSWER TO THAT QUESTION IS YES.

IT IS UNDISPUTED THAT THE STATE OF GEORGIA CRAFTED AND ISSUED THE GNETS RULE, SECTION 160-4-7-.15 OF THE GEORGIA COMPILED RULES AND REGULATIONS. A COPY OF THE GNETS RULE HAS BEEN PULLED UP ON THE SCREEN FOR THE COURT'S CONVENIENCE. AND WE ALSO HAVE PAPER COPIES IF YOUR HONOR WOULD LIKE THAT. THIS IS EXHIBIT SEVEN FROM THE UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT.

THE GNETS RULE IS A STATE REGULATION THAT HAS BEEN IN

EFFECT FOR SEVERAL YEARS. AND IT WAS MOST RECENTLY REVISED IN 2017. THE RULE IS BINDING ON EACH OF THE 24 REGIONAL GNETS PROGRAMS. AND IT SETS FORTH REQUIREMENTS PERTAINING TO NEARLY EVERY AREA OF THE GNETS PROGRAM OPERATIONS.

I'M GOING TO BRIEFLY HIGHLIGHT A FEW PROVISIONS FROM THE GNETS RULE TO SHOW JUST HOW INVOLVED THE STATE IS IN CRAFTING REGULATIONS THAT SHAPE THE OPERATIONS OF THE GNETS PROGRAM.

AMONG OTHER THINGS, THE STATE, THROUGH THE GNETS RULE, ESTABLISHES THE PURPOSE OF THE GNETS PROGRAM. AND WE'RE GOING TO TRANSITION TO SECTION TWO OF THE GNETS RULE HERE, WHICH THE COURT CAN SEE. IN FACT, THE SECTION HERE IS TITLED, GNETS PURPOSE AND SERVICES.

AS WE CONTINUE TO WALK THROUGH SECTION TWO OF THE GNETS RULE, THE COURT CAN ALSO SEE THAT THE STATE, THROUGH THE GNETS RULE, SETS ELIGIBILITY REQUIREMENTS. SPECIFICALLY THE STATE SETS AGE REQUIREMENTS. AND AS THE COURT CAN SEE HERE, THE PROGRAM IS FOR STUDENTS WITH DISABILITIES, AGES 5 THROUGH 21.

THE STATE ALSO SETS REQUIREMENTS REGARDING THE NECESSARY DISABILITY DIAGNOSES AND OTHER ELIGIBILITY REQUIREMENTS FOR STUDENTS TO PARTICIPATE IN THE PROGRAM, HIGHLIGHTED HERE AT THE END OF SECTION TWO -- PROVISION 2(A).

MOVING ON TO SECTION 2(C) OF THE GNETS RULE, THE STATE, THROUGH THE GNETS RULE, SETS EXPECTATIONS REGARDING

SERVICE DELIVERY. FOR EXAMPLE, IN THE RULE NOTED HERE, AMONG OTHER THINGS, THE STATE REQUIRES THAT GNETS SERVICES SHOULD BE, QUOTE, IMPLEMENTED WITH GREATER INTENSITY AND FREQUENCY THAN WHAT IS TYPICALLY DELIVERED IN A GENERAL EDUCATION SCHOOL ENVIRONMENT, END QUOTE.

AND, FINALLY, MOVING ON TO SECTION FIVE -- AND, AGAIN, THESE ARE JUST A FEW EXAMPLES -- THE STATE, THROUGH THE GNETS RULE, DEFINES THE DUTIES AND RESPONSIBILITIES OF SEVERAL ENTITIES IN RELATION TO GNETS. THOSE ENTITIES INCLUDE ITSELF, PHYSICAL EDUCATION AGENCIES OR SCHOOL DISTRICTS, THE REGIONAL GNETS PROGRAMS, AND FISCAL AGENTS.

SECTION 5(A) HERE FOCUSES SPECIFICALLY ON SOME OF THE STATE'S FUNDING AND MONITORING-RELATED RESPONSIBILITIES.

NOTABLY, THE STATE IS REQUIRED IN 5(A)(1) TO RECEIVE AND DISBURSE FUNDS TO SUPPORT THE GNETS SERVICES. IN 5(A)(2), THE STATE IS REQUIRED TO ADMINISTER GRANT FUNDS. THIS INCLUDES DEVELOPING RULES AND PROCEDURES RELATED TO THE FUNDING PROCESS IN THE GNETS PROGRAM.

THEN MOVING ON, NOTIFYING -- SO DEVELOPING RULES AND PROCEDURES, NOTIFYING FISCAL AGENTS ABOUT THE FUNDING THAT'S BEEN ALLOTTED TO THE VARIOUS PROGRAMS. APPROVING PROGRAM BUDGETS FOR THE VARIOUS REGIONAL GNETS PROGRAMS.

AND THEN, HONESTLY, I WANT TO PAUSE FOR A BRIEF MOMENT, YOUR HONOR, TO NOTE WITH RESPECT TO FUNDING, FIRST WITH REGARD TO PROGRAM BUDGETS, THAT IN THE STATE'S BRIEFING, THEY

INSIST THAT THE STATE IS NOT INVOLVED WITH DETERMINING HOW PROGRAMS SPEND THEIR FUNDING. BUT AS THE COURT CAN SEE HERE, THE STATE IS DIRECTLY INVOLVED IN APPROVING WHAT MAKES IT INTO EACH REGIONAL PROGRAM'S BUDGET. SO THE STATE DOES HAVE A ROLE IN THAT CAPACITY.

I'D ALSO LIKE TO NOTE, YOUR HONOR, THAT GIVEN THE STATE'S ROLE OF FUNDING, I DO WANT TO HIGHLIGHT THAT THE STATE'S FUNDING FORMULA FOR GNETS ONLY ALLOTS FUNDING FOR STUDENTS RECEIVING SERVICES IN SEGREGATED SETTINGS. THEREFORE, NOTWITHSTANDING THE RANGE OF ENVIRONMENTS THAT YOU WILL HEAR THE STATE LISTING THAT STUDENTS CAN BE PLACED IN THROUGH GNETS, THE MANNER IN WHICH THE STATE ADMINISTERS FUNDING DEPRIVES THE PROGRAMS OF THE RESOURCES NEEDED TO ACTUALLY OFFER THOSE SERVICES IN FULLY INTEGRATED ENVIRONMENTS.

AND THEN FINALLY HERE I'D LIKE TO NOTE THAT THE GNETS RULE GIVES THE STATE MONITORING RESPONSIBILITIES IN CONNECTION WITH ITS ADMINISTRATION OF FUNDING REQUIRING THE STATE TO, QUOTE, MONITOR GNETS TO ENSURE COMPLIANCE WITH FEDERAL AND STATE POLICIES, PROCEDURES, RULES, AND THE DELIVERY OF APPROPRIATE INSTRUCTIONAL AND THERAPEUTIC SERVICES.

SO FOR ALL OF THESE REASONS, YOUR HONOR, THE UNDISPUTED FACTS SHOW THAT THE STATE'S REGULATORY POWER, PARTICULARLY ITS AUTHORITY TO CRAFT AND ISSUE THE GNETS RULE, IS EVIDENCE OF ITS ADMINISTRATION OF THE GNETS PROGRAM.

MOVING ON TO THE SECOND QUESTION, DO THE UNDISPUTED

FACTS SHOW THAT THE STATE ESTABLISHES CRITERIA FOR STANDARDS REGARDING THE IMPLEMENTATION OF THE GNETS PROGRAM. AGAIN, THE ANSWER IS YES.

WITH REGARD TO CRITERIA SPECIFICALLY, IN THIS COURT'S ORDER DENYING THE STATE'S RENEWED MOTION TO DISMISS, THE COURT OBSERVED THAT STATE LAW REQUIRES THE STATE TO ADOPT BOTH CLASSIFICATION CRITERIA FOR EACH AREA OF SPECIAL EDUCATION TO BE SERVED ON A STATEWIDE BASIS, AS WELL AS CRITERIA USED TO DETERMINE ELIGIBILITY OF STUDENTS FOR STATE-FUNDED SPECIAL EDUCATION PROGRAMS.

FURTHER, AS WE DISCUSSED JUST A FEW MINUTES AGO, THE STATE, THROUGH THE GNETS RULE, SETS ELIGIBILITY CRITERIA FOR PARTICIPATION IN THE PROGRAM.

THE REGIONAL GNETS PROGRAMS ALSO ENSURE THAT THEY THEMSELVES ARE ABIDING BY THESE ELIGIBILITY CRITERIA BY UTILIZING A SET OF FORMS KNOWN AS A CONSIDERATION OF SERVICES FORMS. THESE FORMS, WHICH INCLUDE CHECKLISTS, FLOWCHARTS, AMONG OTHER THINGS, ARE SIGNED OFF ON BY THE STATE. AND THEY ARE ALIGNED TO THE STATE GNETS RULE. THESE DOCUMENTS GUIDE REGIONAL GNETS PROGRAMS THROUGH A SERIES OF STEPS IN ENSURING THAT THEY ARE ONLY CONSIDERING PLACING STUDENTS IN THE PROGRAM WHO MEET THE STATE'S ELIGIBILITY CRITERIA.

FURTHER, THE GNETS STRATEGIC PLAN, SELF-ASSESSMENT AND REVIEW PROCESS, IS ANOTHER VEHICLE THAT THE STATE HAS ESTABLISHED AND IMPLEMENTED REGARDING OPERATING STANDARDS AND

CRITERIA FOR THE GNETS PROGRAM. THE STRATEGIC PLAN PROCESS IS A MANDATORY FRAMEWORK THAT HAS BEEN CREATED AND UTILIZED BY THE STATE FOR MANY YEARS THAT GOVERNS NEARLY EVERY ASPECT OF GNETS PROGRAM OPERATIONS. ALTHOUGH THE PARTICULARS OF THE STRATEGIC PLAN PROCESS HAVE EVOLVED OVER TIME, THE GENERAL FRAMEWORK REMAINS THE SAME.

THE STRATEGIC PLAN -- EXCUSE ME, THE STRATEGIC PLAN AND ITS EMBEDDED SELF-ASSESSMENT CONTAIN FOCUS AREAS SUCH AS INSTRUCTIONAL AND ACADEMIC SUPPORT OR PROGRAM FUNDING AND FISCAL MANAGEMENT. THAT PRESCRIBES SPECIFIC STANDARDS AND ACTION ITEMS THAT THE REGIONAL GNETS PROGRAMS SHOULD IMPLEMENT.

THE REGIONAL PROGRAMS ARE REQUIRED TO USE THESE STANDARDS TO ASSESS THEIR OWN COMPLIANCE WITH THE GNETS RULE. AND THEY DO SO BY COMPLETING THE SELF-ASSESSMENT TWICE A YEAR.

AND AS WE'LL DISCUSS WHEN WE GET TO THE NEXT QUESTION, THE STATE ALSO USES THESE STANDARDS TO ASSESS THE REGIONAL GNETS PROGRAM'S COMPLIANCE WITH THE RULE.

ALL OF THESE FACTS TAKEN TOGETHER DEMONSTRATE THAT THE STATE DEVELOPS AND DIRECTS THE OPERATING STANDARDS TO WHICH THE REGIONAL GNETS PROGRAMS ARE THEN HELD ACCOUNTABLE.

MOVING ON TO THE THIRD QUESTION, DO THE UNDISPUTED FACTS SHOW THAT THE STATE OVERSEES OPERATIONS AND IMPLEMENTATION OF THE GNETS PROGRAM. AGAIN, THE ANSWER IS YES.

THE GNETS RULE AUTHORIZES THE STATE TO ENGAGE IN MONITORING OF THE GNETS PROGRAM AS WE SAW MOMENTS AGO. AND IN

PRACTICE, THAT TAKES A NUMBER OF DIFFERENT FORMS.

AS I JUST NOTED, THE STATE USES THE STRATEGIC PLAN PROCESS TO NOT ONLY SET THE OPERATING STANDARDS FOR THE GNETS PROGRAM, IT ALSO ASSESSES THE REGIONAL PROGRAM'S COMPLIANCE WITH THOSE STANDARDS. THE STATE SPEARHEADS THAT REVIEW PROCESS, WHICH HAS HISTORICALLY INVOLVED STEPS SUCH AS SITE VISITS, FACILITY TOURS, MEETINGS WITH GNETS STAFF TO ASK QUESTIONS, REVIEW EVIDENCE, THEIR COMPLIANCE, AND TO SHARE FINAL RATINGS AND FEEDBACK.

THE STATE ALSO IMPOSES BROAD DATA REPORTING OBLIGATIONS ON THE REGIONAL PROGRAMS. AND IT HAS REQUIRED REGIONAL GNETS PROGRAMS TO CONDUCT IEP FILE REVIEWS FOR STUDENTS IN GNETS. THE TOPICS THAT THE PROGRAMS HAVE BEEN REQUIRED TO REPORT DATA ON ARE VARIED, AND THEY ALL PERTAIN TO OPERATIONS, INCLUDING STUDENT PLACEMENT, STAFFING, AVAILABLE SERVICES AND SUPPORTS, AND CONSTRUCTION, AMONG OTHER THINGS. THAT INFORMATION IS NOT JUST COLLECTED BY THE STATE, IT IS THEN USED TO INFORM DECISIONS RELATED TO BUDGET ALLOTMENTS, PROGRAM NEEDS, AND PROGRAM ALIGNMENT WITH THE GNETS RULE.

FINALLY, THE STATE IS INVOLVED IN MANY OF THE DAY-TO-DAY AFFAIRS OF THE REGIONAL GNETS PROGRAM AND THE PROGRAM AT LARGE. FOR EXAMPLE, THE STATE EMPLOYS A FULL-TIME GNETS PROGRAM MANAGER AND PROGRAM SPECIALISTS WHO PROVIDE OVERSIGHT. THESE INDIVIDUALS FACILITATE PERIODIC STATEWIDE GNETS DIRECTOR MEETINGS, AND THEY PROVIDE RESOURCES TO THE

GNETS DIRECTORS.

THEY ALSO ARE IN PERIODIC COMMUNICATION WITH THE REGIONAL GNETS DIRECTORS. IN THE UNITED STATES' BRIEFS, WE PROVIDED THE COURT WITH JUST A SAMPLING OF APPROXIMATELY 30 DIFFERENT COMMUNICATIONS. I SAY ABOUT 30 DIFFERENT COMMUNICATIONS AND EXPERTS OF DEPOSITION TESTIMONY FROM GNETS DIRECTORS TO ILLUSTRATE WAYS THAT THEY HAVE REACHED OUT TO STATE GNETS PERSONNEL FOR DIRECTION AND GUIDANCE ON TOPICS RANGING FROM STUDENT ELIGIBILITY TO SERVICE DELIVERY.

ALTHOUGH THE STATE ATTEMPTED TO DOWNPLAY THE SIGNIFICANCE OF THESE COMMUNICATIONS AND, IN FACT, IN THEIR BRIEFING ONLY ACKNOWLEDGED FOUR OF THEM, THE STATE ULTIMATELY MISSED THE LARGER POINT. REGARDLESS OF HOW THESE COMMUNICATIONS WERE RESOLVED, THERE IS A CLEAR PATTERN OF GNETS DIRECTORS TURNING TO STATE GNETS PERSONNEL FOR DIRECTION ON MATTERS RELATED TO GNETS PROGRAM OPERATIONS.

THIS INFORMATION, TAKEN TOGETHER WITH ALL OF THE OTHER UNDISPUTED FACTS REGARDING THE STATE'S OVERSIGHT ROLE, FURTHER SUPPORT THE CONCLUSION THAT THE STATE ADMINISTERS THE GNETS PROGRAM.

FOURTH, AND FINALLY, DO THE UNDISPUTED FACTS SHOW THAT THE STATE PROVIDES FUNDING TO THE GNETS PROGRAM. THE ANSWER TO THAT QUESTION IS YES.

THE FUNDING THAT THE STATE ALLOTS FOR THE GNETS PROGRAM IS NO SMALL SUM. SINCE 2015, THE STATE HAS ALLOTTED

MORE THAN $60 MILLION EACH YEAR TO THE GNETS PROGRAM, THE VAST MAJORITY OF THAT FUNDING BEING ACTUAL STATE FUNDS. THAT SUM ALSO INCLUDES SEVERAL MILLIONS OF DOLLARS OF DISCRETIONARY FEDERAL FUNDS EACH YEAR THAT THE STATE CHOOSES TO DESIGNATE FOR THE GNETS PROGRAM.

THE STATE ALSO PROVIDES FUNDING SEPARATE FROM THE GNETS GRANT, WHICH IS CAPTURED BY THE FUNDING I JUST MENTIONED, FOR OTHER GNETS SERVICES, INCLUDING FUNDING FOR THERAPEUTIC SERVICES AND STAFF AND FUNDING FOR OTHER SUPPORTS AND SERVICES, LIKE BEHAVIORAL AND ACADEMIC ASSESSMENTS.

THE UNDISPUTED FACTS FURTHER REVEAL THAT THE STATE'S ROLE IS NOT LIMITED TO DISBURSING GNETS FUNDING. AMONG OTHER THINGS, THE STATE ESTABLISHES AND MANAGES THE PROCESS FOR ALLOTTING AND DISBURSING FUNDS TO THE REGIONAL PROGRAMS AND TO THE GNETS PROGRAM AT LARGE. AMONG OTHER THINGS, THE STATE CREATES THE GNETS FUNDING FORMULA. THE STATE IS CREATING AND REVIEWING THE GRANT APPLICATIONS THAT ARE BEING USED TO MAKE DECISIONS ABOUT WHO'S RECEIVING WHAT FUNDING. THE STATE REQUIRES THE PROGRAMS TO SIGN ASSURANCES. AND THESE ASSURANCES CONTAIN CONDITIONS ABOUT HOW THE INDIVIDUAL PROGRAMS MUST OPERATE IN EXCHANGE FOR RECEIVING FUNDING.

THE -- THE STATE ALSO APPROVES THE REGIONAL PROGRAM'S BUDGETS, AS WE DISCUSSED EARLIER. AND, FURTHER, THROUGH THE FUNDING PROCESS, THE STATE EFFECTIVELY INCENTIVIZES CERTAIN PLACEMENT DECISIONS BASED ON HOW FUNDING IS OFTEN ALLOTTED.

FOR EXAMPLE, AS I MENTIONED EARLIER, THE FUNDING FORMULA ADOPTED BY THE STATE FOR GNETS ONLY CONSIDERS AS A FACTOR WHETHER STUDENTS ARE BEING SERVED IN SEGREGATED GNETS SETTINGS. CERTAIN SERVICES THAT ARE PROVIDED IN GENERAL EDUCATION SETTINGS, SUCH AS CONSULTATIVE SERVICES, ARE NOT INCLUDED AS PART OF -- ARE NOT INCLUDED IN THE FUNDING FORMULA. THUS, IF EVEN IN THEORY, PROGRAMS CAN CHOOSE FROM A CONTINUUM OF SERVICE LOCATIONS LISTED IN THE GNETS RULE, IN PRACTICE THE FUNDING MECHANISM FOR GNETS DOESN'T SUPPORT THAT OUTCOME.

BY FAILING TO ADMINISTER ADEQUATE FUNDING FOR GNETS SERVICES IN THE GENERAL EDUCATION ENVIRONMENT, PROGRAMS ARE BEING DEPRIVED OF THE ABILITY TO REDIRECT THEIR RESOURCES IN STAFFING TO BEING ABLE TO SERVE THESE STUDENTS IN INTEGRATED SETTINGS.

THESE AND OTHER UNDISPUTED FACTS THAT ARE FULLY SET FORTH IN THE UNITED STATES' BRIEFS AND ACCOMPANYING EXHIBITS ARE SUFFICIENT TO ESTABLISH THAT THE STATE ADMINISTERS THE GNETS PROGRAM AS A MATTER OF LAW.

I ALSO WANT TO JUST TAKE A FEW MINUTES TO ADDRESS SOME OF THE STATE'S OBJECTIONS TO THE UNITED STATES' MOTION. THESE ARGUMENTS LACK MERIT.

FIRST, THE STATE CLAIMS THAT THE PROPER INQUIRY FOR DETERMINING WHETHER TITLE II'S INTEGRATION MANDATE APPLIES IS NOT WHETHER A PUBLIC ENTITY ADMINISTERS THE SERVICES AND PROGRAMS AND ACTIVITIES AT ISSUE HERE BUT, RATHER, THAT THESE

SERVICES, PROGRAMS, AND ACTIVITIES ARE, QUOTE, PROVIDED BY, END QUOTE, THE PUBLIC ENTITY.

AS A PRELIMINARY MATTER, YOUR HONOR, THE STATE'S POSITION IS A RADICAL REVERSAL FROM THE POSITION THAT IT ASKS THIS COURT TO TAKE AT THE PLEADINGS STAGE. IN ITS MOTION TO DISMISS, INITIALLY, THE STATE CONCEDED THAT THE LANGUAGE SET FORTH IN 28 C.F.R. SECTION 35.130, WHICH USES A TERM ADMINISTER, WAS THE APPROPRIATE STANDARD. IT ALSO ARGUED THAT THE TERM ADMINISTER SHOULD BE CONSTRUED IN ACCORDANCE WITH ITS PLAIN MEANING. AND IT USED THE DEFINITION OF, QUOTE, MANAGE AND BE RESPONSIBLE FOR THE RUNNING OF, END QUOTE, IN QUOTE, PRACTICAL MANAGEMENT AND DIRECTION, END QUOTE.

FOR AN ISSUE THAT WAS SO CENTRAL TO THE STATE'S ARGUMENTS AT THE PLEADINGS STAGE, ONE CAN'T HELP BUT QUESTION WHY THE STATE WOULD NOW CHANGE ITS POSITION. WE BELIEVE IT IS BECAUSE THE STATE IS NOW CONFRONTED WITH THE FACTUAL RECORD AT THE CLOSE OF DISCOVERY THAT SUPPORTS THE UNITED STATES AND EVEN THE COURT'S PRIOR CONCLUSIONS THAT THE STATE ADMINISTERS GNETS.

SETTING THAT ASIDE, WE TAKE THE POSITION THAT THE STANDARD THE STATE NOW OFFERS IS INCORRECT UNDER ANY INTERPRETATION. FIRST, THE STATE OFFERS NO AUTHORITY FOR THIS NEW INTERPRETATION OF THE ADA AND ITS IMPLEMENTING REGULATION. INSTEAD, THE STATE RELIES ON GENERAL CASE LAW THAT MERELY ESTABLISHES THE GENERAL PRINCIPLE THAT REGULATIONS, IN ORDER TO BE VALID, MUST BE CONSISTENT WITH THE STATUTE UNDER WHICH THEY

ARE PROMULGATED, TO WHICH WE DO NOT -- WE DON'T DISAGREE.

THE STATE FURTHER ARGUES THAT, TO THE EXTENT THE ADA OR TITLE II REGULATION DOESN'T DEFINE THE TERM ADMINISTER, THE COURT MUST APPLY THE GENERAL RULES OF STATUTORY CONSTRUCTION AND LOOK AT THE PLAIN MEANING OF THE TERM. THE STATE'S CHOSEN REFERENCE POINT FOR THE PLAIN MEANING OF ADMINISTER NOW COMES FROM THE MERRIAM-WEBSTER DICTIONARY, MOVING AWAY FROM THE SOURCES IT HAD PREVIOUSLY RELIED ON.

THE MERRIAM-WEBSTER DICTIONARY FIRST DEFINES ADMINISTER TO MEAN MANAGE OR SUPERVISE THE EXECUTION, USE, OR CONDUCT OF, WHICH IS VERY CONSISTENT WITH THE DEFINITION THAT THE UNITED STATES AND THE COURT HAD PREVIOUSLY USED IN PRIOR INTERPRETATIONS. HOWEVER, THE STATE CHOOSES TO NOW IGNORE THIS FIRST DEFINITION AND IT INSTEAD RELIES ON A SECONDARY DEFINITION THAT IT HAS FOUND OF, TO PROVIDE OR APPLY. AND THEN IT ARGUES THAT ADA LIABILITY ONLY ATTACHES TO THE ENTITY THAT'S DIRECTLY ENGAGED IN DISCRIMINATORY CONDUCT.

THE STATE MISUNDERSTANDS THE TRUE REACH OF THE ADA IN MAKING THIS ARGUMENT, YOUR HONOR. THE TITLE II REGULATION EXPRESSLY REACHES CONDUCT THAT'S RELATED TO SERVICES, PROGRAMS, AND ACTIVITIES, EVEN THAT HAVE BEEN OUTSOURCED BY THE STATE TO THIRD PARTIES. AND THE REGULATIONS EVEN SAY AS MUCH USING LANGUAGE SUCH AS, THROUGH CONTRACTUAL OR OTHER MEANS.

FURTHER, IN OUR BRIEF, WE CITE TO NUMEROUS COURTS THAT HAVE FOUND THAT THE STATE CAN BE HELD LIABLE UNDER TITLE

II EVEN WHEN IT HAS CONTRACTED OUT THE PROVISION OF THE CHALLENGED SERVICES THAT ARE AT ISSUE. THEREFORE, EVEN IF THE COURT WAS TO APPLY THE STANDARD, WHICH WE BELIEVE IS NOT THE APPROPRIATE STANDARD, WE BELIEVE THIS COURT COULD STILL CONCLUDE THAT THE STATE PROVIDES GNETS SERVICES BOTH DIRECTLY AND INDIRECTLY.

FINALLY, YOUR HONOR, I WOULD LIKE TO NOTE THAT IN -- NOTWITHSTANDING THE STATE'S ARGUMENTS, IN A NUMBER OF THEIR BRIEFS, INCLUDING IN THEIR BRIEF ON THIS MOTION, NOTING THAT THE UNITED STATES HAD WAIVED ARGUMENTS, WE WOULD LIKE TO JUST AFFIRMATIVELY NOTE THAT WE'VE ADDRESSED ALL OF THE STATE'S ARGUMENTS IN SOME FORM. WE HAVE ADDRESSED THE ARGUMENTS IN OUR BRIEFS, ON OUR MOTION FOR PARTIAL SUMMARY JUDGMENT. WE'VE ADDRESSED THEM IN THE STATE'S SUMMARY JUDGMENT MOTION. AND, IN FACT, BECAUSE SO MANY OF THE STATE'S ARGUMENTS THAT THEY RECYCLED FROM PAST MOTIONS, WE WOULD ALSO NOTE, YOUR HONOR, THAT THE UNITED STATES HAS ADDRESSED MANY OF THESE ARGUMENTS REPEATEDLY IN BRIEFING ON THE STATE'S PRIOR MOTION TO DISMISS AND MOTION FOR JUDGMENT ON THE PLEADING.

ONE POINT, HOWEVER, THAT WE WILL REITERATE IN THE TIME THAT REMAINS ADDRESSES AN ISSUE THAT THE STATE MISCHARACTERIZES REPEATEDLY IN ITS BRIEFING AND THAT WAS ALSO ALLUDED TO EARLIER THIS MORNING. THE STATE CLAIMS THAT IT IS NOT THE ENTITY THAT DISCRIMINATES AGAINST GNETS STUDENTS BECAUSE THE STATE IS NOT THE ONE MAKING DECISIONS THAT ARE

BEING CHALLENGED, SUCH AS DETERMINING WHERE SERVICES ARE PROVIDED AND WHERE STUDENTS RECEIVE SERVICES. INSTEAD, THE STATE CLAIMS THAT THESE ARE DECISIONS MADE AT THE LOCAL LEVEL BY LEA'S AND IEP TEAMS.

WITH REGARD TO OUR ARGUMENT ON STATE ADMINISTRATION, WE DISAGREE WITH THE STATE'S CONCLUSIONS HERE. THE STATE ADMINISTERS A STATEWIDE SERVICE DELIVERY SYSTEM THAT, AMONG OTHER THINGS, CREATES REGULATIONS AND STANDARDS THAT ESTABLISH THE PARAMETERS FOR WHERE THESE GNETS SERVICES ARE PROVIDED AND WHERE STUDENTS ARE RECEIVING THE SERVICES. THEREFORE, THE LEA'S AND IEP TEAMS ARE NOT OPERATING IN A VACUUM.

FURTHER, AS WE EXPLAINED EARLIER, THE MANNER THROUGH WHICH THE STATE FUNDS THE GNETS PROGRAM DEPRIVES ENTITIES LIKE THE LEA'S AND THE IEP TEAMS FROM TRULY BEING ABLE TO MAKE INDEPENDENT DECISIONS RELATED TO WHERE THESE SERVICES ARE PROVIDED.

FINALLY, EVEN THIS COURT CONCLUDED IN ITS DECISION ON THE STATE'S MOTION FOR JUDGMENT ON THE PLEADINGS THAT, BASED ON THE FACTS ALLEGED, THE STATE, QUOTE, BEARS SOME RESPONSIBILITY FOR OPERATING AND ADMINISTERING THE GNETS PROGRAM IN DISCRIMINATORY MANNER.

FURTHER, THE COURT NOTED THAT ANY DECISION, QUOTE, ADDRESSING THESE ACTS WOULD BE REDRESSABLE BY A JUDGMENT AGAINST THE STATE, END QUOTE. THESE ALLEGATIONS ARE NOW SUPPORTED BY THE FACTUAL RECORD NOW THAT WE'RE AT THE CLOSE OF

DISCOVERY, AND THIS COURT'S PRIOR CONCLUSIONS WOULD STILL APPLY.

ACCORDINGLY, THE STATE, AS THE ULTIMATE ADMINISTRATOR OF THE GNETS PROGRAM, IS RESPONSIBLE FOR THE DISCRIMINATION THAT RESULTS FROM THESE ACTIONS THAT ARE TAKEN.

FOR ALL OF THESE REASONS, WE BELIEVE THE COURT SHOULD GRANT THE UNITED STATES' MOTION.

AND I'LL RESERVE THE REST OF MY TIME FOR AFTER THE STATE'S ARGUMENT.

THE COURT: ALL RIGHT. THANK YOU.

MR. BELINFANTE: YOUR HONOR, MAY I JUST HAVE A COUPLE OF MINUTES TO GET THE --

THE COURT: CERTAINLY.

MR. BELINFANTE: OKAY. THANK YOU.

(WHEREUPON, THERE WAS A PAUSE IN THE PROCEEDINGS.)

MR. BELINFANTE: ALL RIGHT. MAY IT PLEASE THE COURT.

THE COURT: YES.

MR. BELINFANTE: IN THIS MATTER, THE STATE HAS MOVED FOR SUMMARY JUDGMENT ON THE QUESTION OF ADMINISTER AND THE UNITED STATES HAS MOVED FOR PARTIAL SUMMARY JUDGMENT ON THE QUESTION. WHILE I'LL BE ADDRESSING THE UNITED STATES' MOTION HERE, THE ARGUMENTS SHOW WHY THE COURT SHOULD GRANT THE STATE'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR TWO KEY REASONS.

ONE, LEGALLY THE STATE CANNOT ADMINISTER THE GNETS PROGRAM. AND, IN FACT, THE UNITED STATES STILL DOES NOT

ADDRESS CODE SECTION 20-2-152, WHICH ESTABLISHES THAT AS A MATTER OF STATE LAW.

TWO, FACTUALLY IT DOES NOT. WHEN THE COURT REVIEWS THE BRIEFS, IN LOOKING AT OUR RESPONSE ON THE MOTION FOR PARTIAL SUMMARY JUDGMENT AND THE REPLY BRIEF BY THE UNITED STATES, THE RESPONSE GOES THROUGH AND ADDRESSES EVERY SINGLE CITATION THAT IS THERE AND SHOWS WHY THAT CITATION DOES NOT OVERCOME SUMMARY JUDGMENT, MUCH LESS GRANT SUMMARY JUDGMENT.

AND IN THE REPLY BRIEF, THE UNITED STATES MERELY REITERATES WHAT IT SAID IN THE ORIGINAL. IT DOES NOT GRAPPLE WITH ANY OF THE DISTINCTIONS OR FACTS SET FORTH IN THE MEMORANDUM THAT WE PUT IN OPPOSITION. THAT MATTERS.

LOOKING AT THE CASE THAT -- THE LAST THING THE UNITED STATES ARTICULATED IS THAT THIS IS ABOUT THE SYSTEM OF CARE. BUT THAT'S NOT WHAT THE BRIEFING SAYS. THE BRIEFING MAKES CLEAR THAT THE UNITED STATES' ISSUE IS WITH THE GNETS PROGRAM. ON PAGE TWO OF THEIR BRIEF IN SUPPORT OF THE PARTIAL MOTION FOR SUMMARY JUDGMENT, AT DOCKET 395-1, THEY SAY, NOT ONLY DOES THE GNETS PROGRAM SEGREGATE CERTAIN STUDENTS WITH DISABILITIES, BUT IT DEPRIVES THEM OF EQUAL EDUCATIONAL OPPORTUNITIES.

IT'S NOT ABOUT MEDICAID. IT'S NOT ABOUT THE APEX PROGRAM OVERSEEN BY DBHDD. IT IS ABOUT THE GNETS PROGRAM. AND SO THE DISPOSITIVE QUESTION IS WHETHER THE STATE OF GEORGIA ADMINISTERS OR, AS IT SHOULD BE UNDER THE STATUTE OF THE ADA, PROVIDES THE SERVICES IN GNETS. AND THE ANSWER IS NO.

AS WE PUT IN OUR BRIEF AND HAVE REITERATED SEVERAL TIMES, LOOKING AT THE DISTINCTIONS BETWEEN THE LOCAL AND STATE GOVERNMENTS -- AND THE CITATIONS TO EACH OF THESE ARE IN OUR BRIEFS -- THESE ARE ALL THE THINGS THAT THE LOCAL EDUCATION AGENCIES AND RESA'S DO. THEY DECIDE WHETHER TO APPLY FOR THE GNETS GRANT. THEY DON'T HAVE TO.

THEY ALLOCATE SUPPORTS AND RESOURCES FOR SERVICE DELIVERY. THAT'S A STATUTE.

THEY COLLABORATE WITH COMMUNITY SERVICE PROVIDERS. THEY MAINTAIN SCHOOL BUILDINGS.

YOU HEARD EARLIER THAT THE UNITED STATES DESCRIBED THE CONDITION OF SCHOOL BUILDINGS WITHIN THE STATE OF GEORGIA. THAT IS A LOCAL EDUCATION AGENCY ISSUE. AND IF THE CONCERN THAT THE UNITED STATES HAD IS WITH HOW THE LOCAL EDUCATION AGENCIES ARE MAINTAINING THEIR BUILDINGS OR HOW THE POSTERS APPEAR ON THE WALL, THEN THEY COULD BRING A CLAIM AGAINST A LOCAL EDUCATION AGENCY. THERE'S NO REASON WHY THEY COULD NOT DO THAT HERE.

THE LOCAL STATE AGENCIES HIRE AND FIRE SCHOOL EMPLOYEES. SO TO THE EXTENT THAT DR. MCCART IS CONCERNED ABOUT THE QUALITY OF EDUCATION PROVIDED IN GEORGIA, WHICH IS BOTH RELEVANT TO AN ADA CLAIM, THERE'S NOTHING THAT THE STATE CAN DO IN THAT CONTEXT.

THE LOCAL EDUCATION AGENCIES PROVIDE TRAINING TO EDUCATORS, INCLUDING THOSE IN GNETS. THE LOCAL EDUCATION

AGENCIES DECIDE WHERE TO PROVIDE GNETS SERVICES. AND THAT'S CRITICAL. THE GNETS RULE -- AND THE ONE PART YOU DIDN'T HEAR ABOUT, AND WE'LL GET TO IT -- IS 4(C), WHICH MAKES VERY CLEAR THAT IT IS A LOCAL DECISION AND THAT LOCALS ARE AUTHORIZED BY THE GNETS RULE TO PROVIDE ITS SERVICES IN THE MOST INTEGRATIVE SETTING ALL THE WAY TO THE MOST SEPARATE SETTING THAT THE GNETS PROGRAM ALLOWS.

AND AT THIS POINT, IT'S IMPORTANT TO TAKE A STEP BACK, BECAUSE GNETS IS PART OF THE CONTINUUM OF SERVICES. AND THERE IS A STEP PAST IT WHERE STUDENTS RECEIVE RESIDENTIAL CARE AT A MUCH MORE ISOLATED ENVIRONMENT. AND GNETS HELPS PREVENT THEM FROM GOING THERE. THE LOCALS DETERMINE THROUGH THEIR IEP TEAMS ON AN INDIVIDUALIZED BASIS WHAT SERVICES ARE APPROPRIATE. THE STATE IS NOT A PART OF THAT, NOR DOES THE STATE GET INVOLVED IN PROVIDING TRANSPORTATION, AND NOR DOES THE STATE SERVE ON IEP TEAMS.

THE DEPARTMENT NEVER ADDRESSES THESE ISSUES, NEVER SAYS WHY THEY DON'T MATTER. IT SIMPLY RELIES ON A SERIES OF ABOUT TWO TO THREE E-MAILS PER SIDE. AND THEIR BURDEN AT SUMMARY JUDGMENT WAS NOT TO PROVIDE THE COURT WITH A SAMPLE, BUT TO DEMONSTRATE THAT THERE IS A QUESTION OF MATERIAL FACT AND, AT THE VERY LEAST, TO COUNTER WHAT THE STATE HAS PUT FORTH IN ITS BRIEFING AND LOOKING AT THAT NOW.

AND AS WE DO TURN TO WHAT THE FACTS WERE AT DISCOVERY, IT'S IMPORTANT TO REMEMBER HOW MASSIVE AND

SIGNIFICANT DISCOVERY WAS IN THIS CASE. THERE WERE TOURS OF FACILITIES, AS THE COURT HEARD. FIFTY DEPOSITIONS. PRODUCTION OF OVER 728,200 DOCUMENTS THAT WERE 5.5 MILLION PAGES.

SO WHEN YOU THINK ABOUT THAT SCOPE, AND THEN THE UNITED STATES TELLS YOU, WE HAVE TWO E-MAILS FROM TWO PARENTS, AND THEY ARE BRINGING A CLAIM FOR SYSTEMIC RELIEF? THAT IS NOT MEETING THEIR BURDEN AT SUMMARY JUDGMENT FOR A SYSTEMIC CLAIM. IF THEY WANTED TO BRING AN INDIVIDUAL CLAIM, PERHAPS. BUT THE REASON THEY DIDN'T DO THAT IS BECAUSE THAT IS CLEARLY AN I.D.E.A. CLAIM. AND THE DEPARTMENT OF JUSTICE LACKS THE AUTHORITY TO BRING AN I.D.E.A. CLAIM.

THE FIRST THING THAT THE UNITED STATES SAYS IN THEIR BRIEF AT PAGE THREE IS THAT THE GNETS PROGRAM IS DEVELOPED AND FUNDED BY THE STATE OF GEORGIA. THERE'S NO CITATION TO THAT IN THE RECORD. AND WHAT THE CODE SECTION 20-2-270.1, WHICH IS THE ONLY CODE -- OR STATUTE IN GEORGIA THAT EVEN MENTIONS THE GNETS PROGRAM, AND EVEN THEN NOT BY NAME, DOES NOT ESTABLISH THE STATE OF GEORGIA DEVELOPED IT AT ALL, NOR IS IT CLEAR WHAT THAT EVEN MEANS.

FURTHER, IN TERMS OF FUNDED BY THE STATE OF GEORGIA, IT IS A TRI-PART FUNDING. LOCALS FUND PART. THE STATE FUNDS PART, IF THE LOCALS CHOOSE TO APPLY FOR A GRANT. AND THE UNITED STATES DEPARTMENT OF EDUCATION FUNDS ABOUT 17 PERCENT OF THE GNETS GRANT BUDGET. THAT'S IN DOCKET 434, PAGE EIGHT. SO FUNDING IS NOT UNIQUE TO THE STATE OF GEORGIA, NOR HAVE THEY

SHOWN THAT IT IS AT THE LEVEL THAT WOULD DESCRIBE ADMINISTRATION, WHICH BEGS EVEN FURTHER THE QUESTION OF, IF THE ISSUE IS THAT THE GNETS PROGRAM IS BEING ADMINISTERED IN A DISCRIMINATORY MANNER AND LOCAL EDUCATION AGENCIES ARE NOT EVEN REQUIRED TO USE THE GNETS FUND, THAT MAKES ADMINISTRATION EVEN FURTHER REMOVED. THIS IS NOT A CASE WHERE THE STATE IS SAYING THAT THIS IS THE ONLY WAY TO PROVIDE SPECIAL EDUCATION IN THE STATE OF GEORGIA. IT IS A CHOICE BY THE LOCAL EDUCATION AGENCIES.

AT PAGE FOUR OF THEIR BRIEF, THE UNITED STATES SAYS THAT THE GNETS' 24 REGIONAL PROGRAMS ARE EACH ANSWERABLE TO THE STATE. WHAT'S THE AUTHORITY FOR THAT? THEY CITE FOUR REQUESTS FOR ADMISSIONS, DOCKET 395, AT 33. HERE'S WHAT THOSE REQUESTS SAID: ADMIT THAT THE FIRST GNETS PROGRAM LOCATION WAS A SINGLE EDUCATIONAL SYSTEM IN ATHENS, GEORGIA.

NUMBER FOUR: ADMIT THAT IN 1976, THE STATE REORGANIZED THE PSYCHO-ED CENTERS OPERATING THROUGHOUT THE STATE INTO 24 REGIONS. IT CREATED REGIONS. IT DID NOT MAKE ANY OF THE DETERMINATIONS. AND THE STATE SPECIFICALLY OBJECTED TO ANY IMPLICATION THAT THAT MEANS THE STATE IS ADMINISTERING.

WHAT NEXT?

NUMBER FIVE: ADMIT THAT IN 2007, THE STATE RENAMED THE PSYCHO-ED CENTERS TO GNETS. THERE'S NO INDICATION OF WHAT RENAMING DOES IN TERMS OF ADMINISTER. AND THE UNITED STATES HAS CERTAINLY NOT INDICATED ANYTHING ITSELF.

NUMBER SIX: ADMIT THAT THE GNETS PROGRAM CURRENTLY INCLUDES THE FOLLOWING 24 REGIONAL PERMIT. YOUR HONOR, THAT HAPPENS THROUGHOUT THE UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT, TO CLAIM THAT THE STATE IS -- THAT THE GNETS SYSTEMS ARE ANSWERABLE TO THE STATE BASED ON THOSE REQUESTS FOR ADMISSIONS IS SIMPLY MISCHARACTERIZING THE EVIDENCE.

PAGE FOUR, THE UNITED STATES SAYS THAT THE STATE LEGISLATIVELY MANDATED A SYSTEM OF CARE. THE PROBLEM IS, THAT GOT THE LAW WRONG. AND THAT IS A LEGAL ISSUE AND NOT A FACTUAL ONE. THE CODE SECTION THEY CITE, 49-5-220(A)(6), IT'S IN THEIR BRIEF AT PAGE FIVE, NOTE TEN, IT'S A DECLARATORY STATEMENT OF THE GENERAL ASSEMBLY ABOUT ITS INTENTION, LITERALLY, QUOTE, THE GENERAL ASSEMBLY DECLARES ITS INTENTION AND DESIRE TO, AND THEN IT LISTS SEVERAL THINGS. THAT IS NOT AN OPERATIONAL STATUTE THAT SAYS THAT MANDATES ANYTHING AS A MATTER OF LAW. AND THE UNITED STATES DOESN'T RESPOND TO THAT.

THEY THEN CITE TO FORMER DBHDD COMMISSIONER JUDY FITZGERALD'S TESTIMONY FOR THE IDEA THAT DBHDD OVERSEES ALL MENTAL HEALTH SERVICES IN GEORGIA. THAT'S NOT WHAT SHE SAID. SHE SAID THEY OVERSEE IT FOR THOSE PERSONS FOR WHOM THEY HAVE JURISDICTION AND MADE VERY CLEAR IT WAS NOT EVERYONE.

THAT EVIDENCE DOES NOT ESTABLISH THAT THE STATE OF GEORGIA LEGISLATIVELY MANDATED A SYSTEM OF CARE. NOT EVEN CLOSE.

THE NEXT STATEMENT ON PAGE SIX IS THAT THE STATE

REGULATES THE GNETS PROGRAM OPERATIONS PRIMARILY THROUGH THE GNETS RULE. THAT, TOO, IS NOT A QUESTION OF FACT BUT A QUESTION OF LAW. THE MEANING OF A REGULATION IS A LEGAL QUESTION. THAT'S THE ELEVENTH CIRCUIT IN MCFARLAND FROM 2004. AND ARGUMENTS ABOUT LEGAL CONCLUSIONS DO NOT OVERCOME SUMMARY JUDGMENT. THE ELEVENTH CIRCUIT AGAIN IN TAYLOR VERSUS POLHILL IN 2020.

BUT THE ANALYSIS THAT THE UNITED STATES OFFERS ON THE GNETS RULE ITSELF IS NOT CONSISTENT WITH THE TEXT OF THE REGULATION ITSELF. AND THIS IS THE PIECE THAT THEY CONTINUE TO IGNORE. 4(C). GNETS CONTINUUM OF SERVICES MAY BE DELIVERED AS FOLLOWS: MOST INTEGRATED TO FACILITIES PROVIDED IN A GNETS FACILITY FOR THE FULL DAY.

THOSE ARE THE DECISIONS MADE AT THE LOCAL LEVEL. AND THAT IS WHAT THE UNITED STATES SAYS IS DISCRIMINATORY. UNLESS THE UNITED STATES' ARGUMENT IS THAT THIS CONTINUUM ITSELF IS DISCRIMINATORY, WHICH THEY HAVE NOT ARTICULATED, THEY CAN'T MAKE THAT ARGUMENT.

THE OLMSTEAD DECISION SAID, SOMETIMES INSTITUTIONALIZATION IS REQUIRED, AND THE ADA VIOLATION OCCURS ONLY IF THERE IS UNJUSTIFIED INSTITUTIONALIZATION. AND DR. MCCART AND DR. PUTNAM AGREE. SO IT'S ULTIMATELY THE LOCALS AND THE RESA'S WHICH WE SAW IN THE PRIOR SLIDE -- CHART THAT DECIDE, ONE, WHETHER TO SEEK GNETS GRANTS; TWO, FOR WHOM GNETS SERVICES ARE APPROPRIATE; THREE, WHERE GNETS SERVICES WILL BE

PROVIDED; AND, FOUR, WHO WILL PROVIDE THE SERVICES.

THE UNITED STATES WOULD LIKE THE COURT TO SAY, WELL, JUST BECAUSE THE STATE HAS A REGULATION WITHOUT, YOU KNOW, ANSWERING THE TEXT OF THE REGULATION AND BECAUSE IT DOES SOME FUNDING, THAT'S ENOUGH. THAT'S A STRICT LIABILITY STANDARD. IT IS NOT APPLICABLE IN THE ADA. AND I'LL GET TO THAT IN A MOMENT, BECAUSE THE UNITED STATES DID NOT RESPOND TO THAT ARGUMENT, EITHER.

THEY NEXT SAY ON PAGE SIX OF THEIR BRIEF -- AND YOU HEARD IT AGAIN A MOMENT AGO -- THAT THE GNETS RULE BINDS THE GNETS PROGRAM. AGAIN, THAT'S A LEGAL CONCLUSION. AND WHEN YOU LOOK AT THE GEORGIA STATUTE SAYING THAT THE LOCALS PROVIDE SPECIAL EDUCATION, THERE'S NOT A BINDING ASPECT TO IT. IT IS ONLY TO THE EXTENT THAT THEY ACTUALLY SEEK AND OBTAIN A GNETS GRANT. BUT THE UNITED STATES CAN'T RELY ON THE RULE TO SHOW ADMINISTRATION IF THEY ARE NOT SHOWING WHAT SPECIFICALLY THE STATE IS DOING TO ADMINISTER THROUGH THE RULE.

THE STATE -- AND WHEN THE COURT LOOKS AT THE GNETS RULE, IT IS BASED ON AND WHOLLY CONSISTENT WITH AND IN FACT CITES TO THE I.D.E.A. IT IS AN I.D.E.A.-BASED REGULATION. AND THIS IS WHERE, ONCE AGAIN, THE UNITED STATES IS TRYING TO PUT THE STATE IN A COMPLETELY UNTENABLE POSITION.

IF IT COMPLIES WITH THE RULE, IT COMPLIES WITH THE I.D.E.A. YET, IF IT COMPLIES WITH THE RULE BASED ON DECISIONS MADE AT A LOCAL LEVEL, THE STATE IS SOMEHOW VIOLATING THE ADA.

THAT DEMONSTRATES A MISREADING OF THE ADA.

AND WHAT IS THE UNITED STATES' FACTUAL SUPPORT FOR THE IDEA THAT THE GNETS RULE BINDS PROGRAMS? AGAIN, THEIR BRIEF AT PAGE SIX. IT'S BASED ON A REQUEST FOR ADMISSION THAT STATED THAT THE -- THAT SAYS JUST THIS: ADMIT THAT THE STATE HAS PERIODICALLY REVISED THE GNETS RULE, MOST RECENTLY IN 2017. THAT'S IT.

NEXT, THEY SAY, WELL, THE GNETS RULE REQUIRES LOCAL SCHOOLS AND THE DOE TO COLLABORATE. COLLABORATION IS NOT ADMINISTRATION. THE UNITED STATES' DEFINITION, THEY ARE FOCUSING ON MANAGEMENT. A MANAGER IS SOMEONE DIFFERENT THAN AN EQUAL. AND THE SUPREME COURT OF GEORGIA HAS SAID THAT THE PROVISION OF EDUCATION SERVICES IN GEORGIA IS EXCLUSIVELY IN THE HANDS OF LOCALS.

THE UNITED STATES THEN SAYS THAT THE GNETS RULE REQUIRES SCHOOLS TO SUBMIT STUDENT DATA. TRUE. AND WE POINTED OUT IN OUR REPLY BRIEF -- AND THE UNITED STATES DOES NOT RESPOND AT ALL -- THE REASON IS THE I.D.E.A., SPECIFICALLY 20 U.S.C. SECTION 1418.

COMPLYING WITH THE I.D.E.A. DOES NOT MEAN THAT THE STATE OF GEORGIA IS ADMINISTERING FOR THE PURPOSES OF THE ADA. U.S. BRIEF THEN, STARTING ON PAGE EIGHT, SAYS THAT STATE EMPLOYEES TOOK DIRECTION -- OR, EXCUSE ME, DIRECTED ACTIVITIES OF GNETS PROGRAM PERSONNEL. THEY CITE FIRST THE PROGRAM MANAGEMENT PLAN. WE POINT OUT THAT THAT INVOLVED THE

DEPOSITION TESTIMONY OF CLARA KEITH, WHERE SHE DISCUSSES AN ASPIRATION, NOT ANYTHING BINDING, THINGS THAT THEY WOULD LIKE TO SEE HAPPEN. THAT'S NOT DIRECTING LOCALS HOW TO ACT. AND THE UNITED STATES DOESN'T RESPOND TO THAT.

WE'D ALSO POINT OUT THAT THE OTHER DOCUMENTS ARE EQUALLY ASPIRATIONAL, AGAIN, NOTHING BINDING, NOTHING MANDATING. THEY CITE THEIR STRATEGIC PLAN ON THEIR BRIEF AT PAGES 9 TO 13. THEY DON'T ANSWER, AS WE POINT OUT, THAT THE MAJORITY OF OFFICIALS WHO DECIDE THE STRATEGIC PLAN AND, INDEED, DRAFTED THE DOCUMENTS YOU HEARD ABOUT A MOMENT AGO, ARE LOCAL OFFICIALS. ELEVEN OF 17, IN FACT.

THE DOCUMENTS CITED BY DOJ ALSO DO NOT IDENTIFY ANY ROLE FOR THE DEPARTMENT OF EDUCATION, THE STATE DEPARTMENT OF COMMUNITY HEALTH, OR THE DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL DISABILITIES. AS A MATTER OF SUMMARY JUDGMENT, THEY ARE NOT CREATING A QUESTION OF MATERIAL FACT AS TO WHAT THESE AGENCIES ARE DOING WITH REGARDS TO THE VERY EVIDENCE THEY ARE CITING.

AND THEY ARE NOT SAYING THE STRATEGIC PLAN ITSELF IS BINDING. AND THERE'S NO DOCUMENTS THAT THEY CITE FOR THE ARGUMENT, AS THEY SAY IN THE SAME SECTION, THAT GNETS PROGRAMS MUST TAKE STEPS BASED ON THE STRATEGIC PLAN IN ORDER TO SOLICIT STATE FUNDS. IT'S JUST NOT THERE.

AND, REMEMBER, IF THE LOCALS COMPROMISE THE MAJORITY OF THOSE DECIDING THE STATE PLAN, IT IS NOT THE STATE THAT IS

ADMINISTERING OR CREATING THE STATE PLAN. IT IS THE LOCALS WHO ARE CHOOSING WHAT TO DO. AND THAT'S THE 11 OUT OF 17.

THEY TALK ABOUT PERSONNEL VISITS IN THEIR BRIEF AT 12 AND 13 AND SAY, WELL, ONCE THE STRATEGIC PLAN IS IN PLACE, THE STATE SENDS PEOPLE OUT TO LOOK AT THE SCHOOLS AND SEE WHAT'S HAPPENING. THAT, TOO, IS REQUIRED BY THE I.D.E.A. AND THE DOCUMENTS CITED ACKNOWLEDGE THAT THE DOE'S ROLE IS NONBINDING AND ADVISORY. THEY DON'T HAVE A DOCUMENT, DESPITE THE 728-SOME-ODD-THOUSAND, WHERE A LOCAL OFFICIAL SAYS, I WANT TO DO X; THE STATE SAYS, NO, YOU MUST DO Y. THAT'S NOT THERE.

IT IS CERTAINLY NOT THERE TO SHOW A SYSTEMIC CLAIM. AND I'LL GET TO THE E-MAILS THEY CITE. I THINK THERE'S LIKE FOUR THAT THEY CLAIM DOES THAT.

AND THE UNITED STATES ALSO ON THIS POINT SAYS, WELL, WE DIDN'T SHOW ALL OUR EVIDENCE, WE DON'T HAVE TO. AT RULE 56, AT SUMMARY JUDGMENT, AS THE COURT KNOWS WELL, IF THERE IS AN ABSENCE OF EVIDENCE, IT IS THE PART OF THE NONMOVING PARTY TO SHOW, HERE'S THE EVIDENCE THAT ADDRESSES THAT. IT'S NOT ENOUGH TO SAY, WELL, WE'VE GOT IT, WE'LL SAVE IT FOR TRIAL. THAT'S NOT HOW IT WORKS. AND PARTICULARLY IF YOU'RE MOVING FOR SUMMARY JUDGMENT, AS THE UNITED STATES IS.

AND PAGES 13 TO 15, THEY SAY, WELL, THERE ARE OTHER DOCUMENTS THAT SHOW THAT THE STATE IS DIRECTING. THEY CITE A SERVICES FORM OR CONSIDERATION OF SERVICES FORM WHICH, ON ITS FACE, IS NOT BINDING ON THE LOCAL GOVERNMENTS. THEY CITE AN

E-MAIL WHERE THE DEPARTMENT OF EDUCATION IS SEEKING INPUT FROM A LOCAL OFFICIAL. SOMEONE WHO IS ADMINISTERING OR MANAGING IN THE TRADITIONAL SENSE DOESN'T GO DOWN AND ASK FOR, HOW SHOULD WE DO THIS. THE REGIONAL GNETS EMPLOYEES -- OR THE OTHER ONES SHOW GNETS EMPLOYEES SEEKING TO PARTICIPATE IN PLANNING SESSION.

AND, YOUR HONOR, THESE ARE ALL ARGUMENTS MADE IN OUR REPLY BRIEF IN OPPOSITION, TO WHICH THERE IS NO RESPONSE.

IN THEIR BRIEF AT PAGE 14, NOTE 42, THEY SAY -- THEY CITE THE OPERATIONS MANUAL. THE OPERATIONS MANUAL ON ITS FACE SAYS IT IS TO PROVIDE GUIDANCE. GUIDANCE IS NOT ADMINISTRATION. GUIDANCE IS NOT PROVISION OF SERVICES. PAGE 14 NOTE 43, THEY CITE DATA DIRECTIVES. THOSE WERE E-MAILS WITH SOME STATE OFFICIALS WHO ARE SEEKING DATA.

WE WILL CONCEDE THE STATE SEEKS DATA. WE WILL ALSO CONCEDE THAT THAT IS REQUIRED BY THE I.D.E.A., 20 U.S.C. 1418. IT'S ALSO NOT CLEAR HOW JUST TRYING TO COLLECT DATA DEMONSTRATES AN ADMINISTRATION. THAT WOULD BE WHAT YOU DO WITH THE DATA, PERHAPS. BUT THE UNITED STATES DOESN'T MAKE THAT ARGUMENT.

THEY TALKED ABOUT A REVIEW OF IEP FILES IN THEIR BRIEF AT PAGE 14 TO 15. BUT THAT RELIES ON TESTIMONY OF GNETS PROGRAM DIRECTORS. AND IN THAT TESTIMONY, IT IS CLEAR THAT THE STATE DID NOT EXPLAIN TO THE REGIONAL DIRECTORS WHY THEY WERE REVIEWING OR WHY IT WAS REVIEWING THE IEP FILES.

AND SO WHAT THE REGIONAL DIRECTORS THEN TESTIFY ABOUT IS SPECULATIVE AND THEREFORE INADMISSIBLE IN TERMS OF WHAT IS THE STATE DOING WITH IT. AND THEY DIDN'T SAY IN THEIR TESTIMONY THAT THERE WAS A CONSEQUENCE TO IT OR ANYTHING OF THAT NATURE. IT JUST SAYS THAT THE STATE DID SEEK TO REVIEW IEP FILES. AGAIN, THAT'S ALSO A REQUIREMENT OF THE I.D.E.A.

THE DOJ MAKES NO RESPONSE TO THE EVIDENTIARY ARGUMENT, EITHER. THEY SAY THEN, WELL, THERE'S DAY-TO-DAY DIRECTION, PAGES 15 TO 16. THAT RELIES ON THE FOUR E-MAILS.

NOW, WE POINT THIS OUT. AND THERE IS AGAIN NO RESPONSE. TWO ARE FROM ONE PERSON ASKING CLARIFICATION ABOUT WHEN THE GNETS RULE COMES INTO EFFECT. THAT'S NOT SHOWING AN ADMINISTRATION. THAT'S A QUESTION ABOUT THE STATE ADMINISTRATIVE PROCEDURE ACT. ONE PERSON ASKING TWO QUESTIONS IS HARDLY EVIDENCE OF ANYTHING SYSTEMIC, EITHER.

THE OTHER ONE IS FROM A GNETS OFFICIAL NOTIFYING THE STATE OF A LOCAL DECISION. I THINK IT WAS MOVING A CHILD FROM ONE SCHOOL TO ANOTHER. THE OFFICIAL WAS NOT ASKING FOR PERMISSION. IT WAS TELLING THE STATE THAT HAD ALREADY HAPPENED.

AND, FINALLY, OF THE 728,000 DOCUMENTS, THERE IS ONE E-MAIL WHERE A DIRECTOR SEEKS ADVICE THAT THE UNITED STATES CITES, SEEKING IT. AND THERE'S NO INDICATION THAT THE STATE -- OR THE LOCAL OFFICIAL HAD TO AGREE WITH WHAT THE STATE SAID. AND, CERTAINLY, ONE E-MAIL FROM A DIRECTOR SEEKING ADVICE IS

NOT EVIDENCE OF ADMINISTRATION, PARTICULARLY IN THE SCOPE OF THIS CASE.

SO THEN THEY LOOK TO FUNDING. THIS WAS PAGES 16 TO 21. THEY TALK ABOUT THE FUNDING FORMULA. BUT THE DOJ PROVIDES NO EVIDENCE, NO TESTIMONY OF HOW THE FORMULA PREVENTS A LOCAL EDUCATION AGENCY FROM USING ANY OF THE OPTIONS THAT ARE HERE. AND IT'S ONE GNETS DIRECTOR WHO TALKS ABOUT THAT, MAYBE TWO. I CAN'T RECALL IF IT WAS ONE OR TWO. IT'S NOT A STATE OFFICIAL. AND IT'S NOT SPECIFICALLY FLOWING THROUGH HOW IT DOES.

AND, MOST IMPORTANTLY, AND THIS WE'LL GET TO, THE FUNDING FORMULA UTILIZED BY THE STATE OF GEORGIA IS INCREDIBLY SIMILAR TO THAT OF THE UNITED STATES DEPARTMENT OF EDUCATION IN THE GRANTS THAT ULTIMATELY FLOW DOWN TO THE GNETS GRANT PROGRAM.

AND SO IF THE COURT ACCEPTS THE ARGUMENT THAT THE UNITED STATES DEPARTMENT OF JUSTICE IS ADVANCING TODAY, IT IS ALSO BY IMPLICATION STATING THAT THE UNITED STATES DEPARTMENT OF EDUCATION ADMINISTERS ITS FUNDS IN A DISCRIMINATORY MANNER. THE UNITED STATES THEN CITES STATE FUNDING CONTRACTS FROM 2019, BRIEF PAGES 17 TO 18, FOOTNOTES 52, THERE'S NO INDICATION -- I THINK IT TALKS ABOUT $1.3 MILLION WORTH OF GRANTS OR OF CONTRACTS THAT WERE DONE DIRECTLY, OUT OF A $75.1 MILLION GNETS GRANT BUDGET IN 2019. IT'S 1.7 PERCENT.

IT DOESN'T SHOW THAT THE STATE IS ADMINISTERING A GNETS PROGRAM. IT SHOWS THAT THE STATE, AT MOST, WOULD BE

ADMINISTERING THAT INDIVIDUAL CONTRACT. BUT EVEN THEN THE UNITED STATES DOES NOT ARGUE THAT THAT CONTRACT DISCRIMINATES. SO, IN OTHER WORDS, IT'S NOT SHOWING ANY TYPE OF ADMINISTRATION THAT COULD BE ACTIONABLE, BECAUSE IT'S NOT JUST ADMINISTERED IN A VACUUM. IT HAS TO BE THE ADMINISTRATION OF SERVICES THAT ARE IN A DISCRIMINATORY MANNER.

THEY THEN SHOW IN THEIR BRIEF AT PAGE 20, NOTE 61, THAT THE GNETS PROGRAM SEEK FUNDS AFTER COSTS ARE INCURRED. IF THE PROGRAMS ARE SEEKING FUNDS AFTERWARDS, THEN THEY ARE CLEARLY NOT TAKING DIRECTION FROM THE STATE ON WHETHER THEY CAN DO IT OR NOT. AND, AGAIN, NO RESPONSE TO THIS.

THE GRANT APPLICATION PROCESS THEY CITE NEXT IN THEIR BRIEF AT 18 AND 19, BUT THERE IS NO EVIDENCE THAT THE APPLICATION PROCESS ITSELF ADMINISTERS THE PROGRAM. IT IS ADMINISTERING A GRANT THAT THE LOCAL AGENCIES CAN USE TO PROVIDE SERVICES IN ANY OF THESE CRITERIA. THE STATE IS NOT ADMINISTERING HOW THE SERVICE IS BEING PROVIDED.

AND SO THAT BEGS THE NEXT QUESTION. WHAT DOES THE WORD ADMINISTER MEAN IN THE REGULATION. NOW, TELLINGLY, THE DEPARTMENT OF JUSTICE BEGINS WITH THE TERM ADMINISTRATION, BECAUSE THAT'S WHAT'S IN THEIR REGULATION. WHAT THEY DON'T TALK ABOUT IS WHAT THE ADA SAYS.

NOW, IF WE LOOK AT THE STATUTE, THE ACTIONABLE STATUTE, THE TOP ONE, IS THAT YOU CAN'T DISCRIMINATE AGAINST SOMEONE OR DENY THEM THE BENEFITS OF SERVICES OF A PUBLIC

ENTITY. WELL, WHO IS THAT PERSON FOR WHOM YOU CAN'T DISCRIMINATE AGAINST? IT'S A QUALIFIED INDIVIDUAL WITH A DISABILITY.

AND WHEN WE LOOK TO WHAT THAT DEFINITION IS, IT'S SOMEONE WHO MEETS THE ESSENTIAL ELEMENTS OR REQUIREMENTS FOR THE RECEIPT OF SERVICES, PROVIDED BY A PUBLIC ENTITY. PROVIDED. THERE'S NO DEFINITION IN THE STATUTE OF PROVIDED, AND THE DEPARTMENT OF JUSTICE HAS NOT PROMULGATED A REGULATION DEFINING WHAT IS PROVIDED, SO, YES, CONSISTENT WITH OUR MOTION TO DISMISS, WE SAY THE PLAIN MEANING CONTROLS. BUT UNLIKE THE MOTION TO DISMISS, WE ARE COMPARING THE STATUTE NOW TO THE REGULATION.

AND THERE IS ABSOLUTELY A WAY TO INTERPRET A STATUTE AS SIMILAR TO THE REGULATION. MERRIAM-WEBSTER HAS, YES, TWO DEFINITIONS FOR THE WORD ADMINISTER. ONE SAYS PROVIDE. ONE SAYS MANAGE.

PROVIDE IS THE EXACT WORD IN THE STATUTE AND IS CONSISTENT WITH THE STATUTE, WHICH MAKES SENSE, BECAUSE PROVIDE MEANS TO ACTUALLY DO. AND ADMINISTER MEANS TO OVERSEE. AND IF THE DEPARTMENT'S POSITION IS MERELY HAVING THE ABILITY TO OVERSEE ESTABLISHES LIABILITY, THAT EXPANDS ADA LIABILITY WELL BEYOND WHAT THE STATUTE ITSELF SAYS WHERE IT HAS TO BE PROVIDED.

THE UNITED STATES AGREES THAT A REGULATION CANNOT PROVIDE MORE LIABILITY THAN A STATUTE. SUPREME COURT SAID THAT

IN THE DECKER DECISION. AND, INDEED, THE OLMSTEAD CASE WHERE THE UNITED STATES' OWN REGULATION AT ISSUE NOW WAS INTERPRETED, JUSTICE KENNEDY SAID, WE MUST BE CAUTIOUS WHEN WE SEEK TO INFER SPECIFIC RULES LIMITING STATE'S CHOICES WHEN CONGRESS HAS ONLY USED GENERAL LANGUAGE IN A CONTROLLING STATUTE, MEANING, BINDING PRECEDENT SAYS, TAKE THE NARROW APPROACH. AND UNDER THAT INTERPRETATION, THE STATE DOES NOT PROVIDE SPECIAL EDUCATION PROGRAMS. AGAIN, THAT'S CODE SECTION 20-2-152.

THE STATUTES LINK UP. THE STATE STATUTE USES THE SAME LANGUAGE AS THE FEDERAL ADA. THAT SHOULD END THE INQUIRY.

AND WHY DOES THE -- THE UNITED STATES SAYS, WELL, THERE'S NO AUTHORITY TO SUPPORT WHAT THE STATE IS NOW ARGUING. THAT'S BECAUSE, AS THE UNITED STATES ACKNOWLEDGES, IN 2016, QUOTE, THE LAWSUIT IS THE FIRST CHALLENGE TO A STATE-RUN SYSTEM FOR SEGREGATING STUDENTS WITH DISABILITIES. THEY THEN RELY ON POLICY ARGUMENTS THAT, IF WE ACTUALLY APPLY THE WORDS OF THE ADA, THAT THAT WOULD PREVENT CONGRESSIONAL INTENT AND CAUSE ALL THESE TERRIBLE ISSUES. THE SUPREME COURT SAID IN 2018, POLICY ARGUMENTS ARE PROPERLY ADDRESSED TO CONGRESS AND NOT THE COURT. AND CONGRESS USED THE WORD PROVIDE, WHICH ADMINISTER CAN BE CONSISTENT WITH.

LOOKING AT THE COURT'S FOUR-FACTOR TEST FROM THE MOTION TO DISMISS -- AND, AGAIN, HERE'S ANOTHER -- THE UNITED STATES SAYS, WELL, THE STATE HAS NO AUTHORITY FOR THE IDEA THAT A DECISION AT THE MOTION TO DISMISS DOESN'T APPLY LATER. THE

COURT'S OWN ORDER EXPLAINS THAT THE ALLEGATIONS ARE ACCEPTED AS TRUE.

WE JUST WALKED THROUGH THE FACTS SHOWING WHAT THE UNITED STATES ALLEGES IS NOT WHAT THE EVIDENCE THEY CITE SHOWS, NUMBER ONE. AND, NUMBER TWO, WE'VE HAD -- THERE'S NOW A NEW ARGUMENT BEFORE THE COURT IT DIDN'T HAVE BEFORE. SO LOOKING AT ESTABLISHING THE CRITERIA, THAT WAS THE FIRST; YES, THE STATE DOES PROVIDE THE CRITERIA. BUT IF YOU LOOK AT GNETS RULE PARAGRAPH 3(A), IT SAYS THE CRITERIA ARE SET FORTH IN STATE BOARD RULE 160-4-7-.06. AND THAT REGULATION CITES PRECISELY TO FEDERAL I.D.E.A. ALLEGATIONS.

AND THE FACT THAT THE CRITERIA IS ESTABLISHED CANNOT BE A BASIS FOR STRICT LIABILITY. JUDGE BROWN RECOGNIZED THAT IN THE PARALLEL GAO VERSUS GEORGIA DECISION. AS JUDGE BROWN SAID, THE LEVEL OF CONTROL THE PUBLIC ENTITY HAS INFORMS WHETHER THE PLAINTIFF HAS SHOWN A CAUSAL CONNECTION WHEN LOOKING AT THIS EXACT QUESTION. IT'S NOT JUST THAT YOU OVERSEE. THERE HAS TO BE A CAUSAL CONNECTION FROM THAT OVERSEEING OR PROVIDING TO THE DISCRIMINATION.

THE COURT LOOKED AT FUNDING, WE'VE TALKED ABOUT THAT. AND THE COURT SAID IN THE MOTION-TO-DISMISS ORDER AT PAGES 13 TO 14, FUNDING ALONE IS NOT ENOUGH.

NEXT, THE COURT LOOKED AT PROMULGATING REGULATIONS TO CARRY OUT THE PROGRAM. THE REGULATIONS GIVE IT -- YES, THERE IS A REGULATION. BUT THE REGULATION GIVES THE LOCAL

GOVERNMENTS, AS WE'VE SEEN, A TREMENDOUS AMOUNT OF FLEXIBILITY. OVERSEEING THE OPERATIONS AND IMPLEMENTING THE PROGRAM, THAT'S AT THE ORDER AT PAGE NINE.

AGAIN, THE STATE CAN OVERSEE, BUT IT CAN'T IMPLEMENT ANYTHING. IT CAN'T HIRE OR FIRE THE INDIVIDUALS. AND WE WENT THROUGH THAT CHART EARLIER ON WHAT THE STATE CAN DO AND WHAT THE LOCALS CAN DO. AND THIS IS A KEY POINT, AGAIN, THAT THE UNITED STATES DOES NOT RESPOND TO.

IN JACOBSON, THE ELEVENTH CIRCUIT SAID, IF A STATE ENTITY HAS TO GO TO COURT TO ENFORCE SOMETHING, AS OPPOSED TO DOING IT ITSELF, THAT'S NOT CONTROL. AND IF THERE'S NO CONTROL, THERE'S NO TRACEABILITY AND THERE'S NO REDRESSABILITY. THE EVIDENCE THEY CITE FOR THIS WAS LARRY WINTER, A FORMER BOARD MEMBER WHO DOESN'T SAY THAT THEY WENT TO COURT OR NOT, HE SAID THEY WITHHELD THE FUNDING. BUT IT DOESN'T INDICATE THAT THE PROCESS WAS THERE. AND THE UNITED STATES NEVER CHALLENGES THE STATE'S INTERPRETATION OR REALLY NEVER ADDRESSES AS TO WHY STATE LAW REQUIRES THAT JUDICIAL INVOLVEMENT.

THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

MS. WATSON: YOUR HONOR, IN THE TIME THAT REMAINS, I'D LIKE TO ADDRESS A NUMBER OF THE ARGUMENTS THAT WERE RAISED BY THE STATE. BUT I ALSO WOULD JUST LIKE TO REFRAME WHAT THE ISSUE IS FOR THE COURT YET AGAIN.

THE STATE WOULD HAVE THE COURT BELIEVE THAT THE COURT

ISSUE BEFORE THE COURT RIGHT NOW PERTAINS TO LOCAL CONTROL AND THE ROLE OF THE LEA'S AND IEP TEAMS, AMONG OTHERS, IN CONNECTION WITH THE GNETS PROGRAM. BUT, YOUR HONOR, THE ISSUE THAT THE UNITED STATES HAS BROUGHT BEFORE THE COURT IS ABOUT THE STATE'S ADMINISTRATION OF THE PROGRAM, BECAUSE IT IS THE STATE, NOT THE LEA'S AND IEP TEAMS, THAT'S PROMULGATING REGULATIONS THAT THEN SHAPE THE ACTIONS THAT THE LEA'S AND IEP TEAMS CAN TAKE.

IT IS THE STATE, NOT THE LEA'S AND IEP TEAMS, THAT IS ESTABLISHING THE STANDARDS AND CRITERIA THAT INFLUENCE WHAT DECISIONS THE LOCAL ENTITIES CAN MAKE.

IT IS THE STATE THAT'S PROVIDING THE VAST MAJORITY OF FUNDING FOR THE GNETS PROGRAM. BUT THEN THE LEA'S AND IEP -- THAT THE LEA'S AND OTHER LOCAL ENTITIES ARE USING.

AND IT'S THE STATE THAT'S PROVIDING OVERSIGHT AT A STATEWIDE LEVEL THAT, AGAIN, IS SHAPING MANY OF THE ACTIONS THAT THE LEA'S AND IEP TEAMS ARE TAKING.

SO WITH THAT IN MIND, I WOULD LIKE TO RESPOND TO A FEW SPECIFIC ISSUES THAT THE STATE HAS RAISED. SO ONE OF THE ISSUES THAT WAS RAISED BY THE STATE IS WHETHER THE GNETS RULE IS BINDING ON THE LEA'S AND OTHER ENTITIES. AND, YOUR HONOR, WE SUBMIT THAT THAT ONE IS A VERY SIMPLE ARGUMENT. IT IS A STATE REGULATION. IT'S SETTING FORTH THE RULES AND THE REQUIREMENTS FOR THE OPERATION OF THE GNETS PROGRAM.

THE STATE ALSO RAISES A NUMBER OF ISSUES RELATED TO

THE STRATEGIC PLAN, ONE OF WHICH WAS THE STRATEGIC PLAN. I THINK THEY ARGUE THAT THE STRATEGIC PLAN WAS CREATED BY LOCAL OFFICIALS.

AND I SHOULD NOTE, ALSO, YOUR HONOR, THAT MANY OF THESE ISSUES WHICH THE STATE IS SUGGESTING WE DID NOT ADDRESS WERE ADDRESSED AFFIRMATIVELY IN OUR STATEMENT OF MATERIAL FACTS AND THE FACTS THAT WE SET FORTH IN CONNECTION WITH OUR MOTION THAT WAS FILED. SO, FOR EXAMPLE, WITH REGARD TO THE STRATEGIC PLAN, THE STATE CONTENDS IT WAS CREATED BY LOCAL OFFICIALS, BUT WE MAKE CLEAR AT THE OUTSET THAT THE STRATEGIC PLAN WAS SPEARHEADED BY THE STATE. AND IT WAS SPEARHEADED BY THE STATE'S GNETS PROGRAM MANAGER.

AT THE END OF THE DAY, THE STATE IS THE ENTITY THAT IS UTILIZING THIS DOCUMENT FOR MONITORING AND COMPLIANCE PURPOSES. SO WHILE THE STATE IS ATTEMPTING TO DISTRACT THE COURT AND FOCUSING ON FACTS THAT ARE NOT MATERIAL TO THE KEY ISSUE THAT WE ARE RAISING, WE'RE TRYING TO REDIRECT THE COURT BACK TO THE FACT THAT THIS IS A DOCUMENT THAT THE STATE IS USING FOR MONITORING PURPOSES.

WE ALSO DON'T, YOUR HONOR, WITH REGARD TO FUNDING, AGAIN, TO MAKE VERY CLEAR, WE ARE NOT SUGGESTING THAT FUNDING ALONE IS SUFFICIENT TO DETERMINE ADA LIABILITY. BUT WE HAVE GIVEN NUMEROUS EXAMPLES OF HOW THE STATE IS USING FUNDING AND MAKING A LOT OF DECISIONS RELATED TO ADMINISTRATION.

IN PARTICULAR, EVEN THOUGH, YOU KNOW, THE STATE HAS

POINTED OUT THAT THE LEA AND LOCAL ENTITIES' PARTICIPATION IN GNETS IS VOLUNTARY AND THAT THEY ARE INVOLVED IN HIRING AND FIRING THEIR OWN STAFF, AMONG OTHER THINGS, WE NOTE THAT, ONCE THESE ENTITIES CHOOSE TO PARTICIPATE IN THE GNETS PROGRAM, THEY ARE THEN SUBJECT TO THE STATE'S WIDESPREAD AUTHORITY AND THE PARAMETERS THAT ARE THEN SET FORTH BY THE STATE THROUGH THE REGULATIONS, VARIOUS OTHER RULES AND STANDARDS, ASSURANCES THAT REQUIRE THEIR COMPLIANCE, AMONG OTHER THINGS.

WE ALSO NOTE, YOUR HONOR, THE STATE TAKES ISSUE WITH SOME OF THE E-MAILS THAT WERE BROUGHT TO THE COURT'S ATTENTION IN THE UNITED STATES' FILING. BUT, AGAIN, WE JUST POINT OUT TO THE COURT THAT THESE E-MAILS DEMONSTRATE NUMEROUS INSTANCES, MORE THAN JUST THE FOUR THAT THE STATE ACKNOWLEDGE, NUMEROUS INSTANCES OF GNETS DIRECTORS LOOKING TO THE STATE FOR DIRECTION, AND MANAGEMENT, EFFECTIVELY, WITH REGARD TO HOW TO OPERATE THEIR GNETS PROGRAMS.

YOUR HONOR, THE STATE CONTENDS THAT THE U.S. DEPARTMENT OF EDUCATION FUNDING FORMULA IS SIMILAR TO HOW FUNDING OPERATES FOR GNETS, AND THEY MAKE SIMILAR ARGUMENTS IN THEIR BRIEFING. AND WE JUST CONTEND THAT THAT IS NOT -- THAT THAT'S NOT A VALID ARGUMENT. IT'S APPLES-AND-ORANGES COMPARISON.

SO I REALIZE, YOUR HONOR, I'M OUT OF TIME.

THE COURT: IT'S OKAY. GO AHEAD.

MS. WATSON: BUT I THANK YOU SO MUCH, YOUR HONOR, FOR

HEARING ALL OF THESE ARGUMENTS. AND, REALLY, AT THE END OF THE DAY, WE JUST REDIRECT THE COURT AGAIN TO THE FACT THAT THE STATE, NOT MISSTATING ALL THESE OTHER ENTITIES WHO MAY PLAY VARIOUS ROLES IN THE PROCESS, IT IS THE STATE THAT IS THE TRUE ADMINISTRATOR THAT ULTIMATELY SHAPES THESE OTHER DECISIONS THAT THESE OTHER ENTITIES CAN MAKE.

THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

ALL RIGHT. I'M SORRY THAT I'M TALKING WHILE YOU'RE STILL THERE, COUNSELOR, BUT I SHOULD HAVE SAID AT THE BEGINNING, THANK YOU FOR YOUR PROPOSED HEARING SCHEDULE, BUT I'M NOT GOING TO CUT ANYBODY OFF MID-SENTENCE. SO THAT'S MY FAULT FOR NOT MENTIONING THAT. BUT THOSE ARE GUIDELINES FOR US. BUT CERTAINLY THE COURT WANTS TO HEAR AND IS MAKING NOTES OF ALL OF THE THINGS THAT -- THAT WE NEED TO DISCUSS HERE.

AND SO IF YOU ARE RIGHT ON THE -- THE EDGE OF YOUR DEADLINE, YOUR TIME DEADLINE, AND YOU'RE GOING TO START RUSHING, I'D RATHER YOU JUST TAKE YOUR TIME AND FINISH YOUR POINT. IT'S MORE HELPFUL TO THE COURT THAT WAY.

WE ARE RIGHT AT 12:17. I'M SORRY THAT I COULD NOT START THIS HEARING EARLIER. IF SO, WE PROBABLY COULD HAVE PUSHED THROUGH AND FINISHED BEFORE LUNCH. BUT HERE WE ARE AT THE LUNCH HOUR. AND SO I'M GOING TO DISMISS YOU FOR AN HOUR TO RETURN AT 1:15 FOR LUNCH, AND THEN WE WILL PROCEED WITH THE MOTIONS TO EXCLUDE AND THE MOTION TO LIMINE.

IS THERE ANYTHING BEFORE WE DEPART, ON BEHALF OF PLAINTIFF?

MS. WOMACK: NO, YOUR HONOR.

THE COURT: ON BEHALF OF DEFENDANT.

MR. BELINFANTE: NO, YOUR HONOR. THANK YOU.

THE COURT: ALL RIGHT. THEN I WILL SEE YOU ALL ALL BACK AT 1:15. THANK YOU SO MUCH.

THE COURTROOM SECURITY OFFICER: ALL RISE. COURT STANDS IN RECESS UNTIL 1315 HOURS. THANK YOU.

(WHEREUPON, THE LUNCH RECESS WAS HAD FROM 12:18 P.M. UNTIL 1:19 P.M.)

THE COURT: THANK YOU, SIR.

THANK YOU. GOOD AFTERNOON. PLEASE BE SEATED.

ALL RIGHT. THE FIRST MOTION TO EXCLUDE IS DEFENDANT'S REGARDING DR. AMY MCCART.

MR. BELINFANTE: WELL, GOOD NEWS/BAD NEWS, YOUR HONOR. THE GOOD NEWS IS, IT'S MY LAST ONE.

THE COURT: OKAY.

MR. BELINFANTE: THAT MEANS IT'S A HALF AN HOUR.

THE COURT: BAD NEWS COULD HAVE BEEN A LOT WORSE. THAT'S ALL RIGHT.

MR. BELINFANTE: MAY IT PLEASE THE COURT.

THE COURT: YES, SIR.

MR. BELINFANTE: YOUR HONOR, ON BEHALF OF THE STATE OF GEORGIA, WE ARE MOVING TO EXCLUDE ALL OR PORTIONS OF DR. AMY

MCCART'S REPORT AND TESTIMONY AS INCONSISTENT WITH RULE 702 OF THE FEDERAL RULES OF EVIDENCE. IT IS OFFERED TO PROVIDE THE LINK BETWEEN THE DEPARTMENT'S ALLEGATION THAT THE STATE UNJUSTIFIABLY ISOLATES STUDENTS, AND ALSO THAT THERE IS INEQUITABLE EDUCATIONAL OPPORTUNITIES FOR STUDENTS FOR WHOM LOCAL OFFICIALS HAVE RECOMMENDED GNETS SERVICES.

DR. MCCART'S TESTIMONY IS OFFERED BOTH AS A CRITICISM OF IEP TEAMS' RECOMMENDATIONS, AS JUSTICE KENNEDY WOULD SAY, THOUGH, IN THE ABSTRACT, AND ALSO TO THE DAY-TO-DAY OPERATIONS OF GNETS PROGRAMS. AND THE UNITED STATES IS ATTEMPTING TO USE HER TESTIMONY THAT LITERALLY RANGES FROM CLASSROOM POSTERS AND WRITING ON WALLS AS A MATTER OF DISCRIMINATION UNDER THE ADA AND FEDERAL LAW.

IT SHOULD BE EXCLUDED FOR THREE REASONS. HER CONCLUSIONS ARE IRRELEVANT BECAUSE THEY APPLY THE WRONG LEGAL STANDARD. THEY ARE UNHELPFUL TO THE TRIER OF FACT BECAUSE SHE MAKES ARGUMENTS ABOUT THE STATE'S EFFORTS IN TRAINING THAT SHE HAS NOT REVIEWED AND HAS NOT CONSIDERED. AND HER METHODOLOGY, TO THE EXTENT THAT IT IS EVEN ARTICULABLE, IS CERTAINLY NOT RELIABLE. MORE SPECIFICALLY -- WELL, WE'LL GET TO THAT.

DR. MCCART HAS OPINED IN HER REPORT ON THREE THINGS, WHICH TRACK THE LANGUAGE OF THE UNITED STATES' ALLEGATION.

NUMBER ONE, THE GNETS PROGRAM, QUOTE, SEGREGATES -- SEPARATES AND ISOLATES STUDENTS WITH BEHAVIOR-RELATED DISABILITIES IN MULTIPLE AND COMPOUNDING WAYS.

NUMBER TWO, THE GNETS PROGRAM PROVIDES UNFAIR AND UNEQUAL EDUCATIONAL OPPORTUNITIES FOR STUDENTS WITH BEHAVIOR-RELATED DISABILITIES.

AND, NUMBER THREE, THE GNETS PROGRAM'S SYSTEMATIC SEGREGATION OF STUDENTS WITH BEHAVIOR-RELATED DISABILITIES IN THE STATE OF GEORGIA IS UNNECESSARY AND FAILS TO DELIVER EFFECTIVE BEHAVIORAL AND THERAPEUTIC SUPPORTS.

I KNOW THE COURT HAS DECIDED MANY OF THESE MOTIONS BEFORE, SO I'M NOT GOING TO BELABOR THE STANDARDS. JUST BRIEFLY, THOUGH, IT IS THE UNITED STATES THAT BEARS THE BURDEN HERE OF ESTABLISHING THE ADMISSIBILITY OF THEIR OWN EXPERT WITNESS. AND WHILE IT IS TRUE -- THAT'S THE FRAZIER CASE -- AND WHILE IT IS TRUE THAT IN THIS CIRCUIT THE STANDARDS OF RULE 702 ARE RELAXED AT A BENCH TRIAL, THEY ARE STILL APPLIED. AND A CASE REPRESENTING THAT WAS DECIDED BY THE ELEVENTH CIRCUIT IN 2012. IT'S SOVEREIGN MILITARY HOSPITAL ORDER OF ST. JOHN OF JERUSALEM OF RHODES AND OF MALTA VERSUS FLORIDA.

IN THAT CASE, THERE ARE TWO OPINIONS, ONE AT 694 F.3D 1200, AND THEN ON RECONSIDERATION AT 702 F.3D 1279. AND IN THAT CASE, JUDGE PRYOR, WILLIAM PRYOR, POINTS OUT IN THE FIRST DECISION THAT IT WAS ERROR TO NOT MAKE A DECISION AT A BENCH TRIAL ON THE QUESTION OF ADMISSIBILITY OF EXPERT TESTIMONY. THE TRIAL JUDGE ADOPTED PRETTY MUCH THE STANDARD THAT IT'S RELAXED AND THEREFORE DID NOT MAKE FINDINGS.

IT WAS LATER DETERMINED, AND QUOTING FROM THE CASE ON

PAGE 1296, AT BOTTOM, THE DISTRICT COURT ERRED WHEN IT ALLOWED THE WITNESS TO TESTIFY. THAT MUCH IS TRUE. THAT A COURT DID NOT DEEM THAT REVERSIBLE ERROR BECAUSE THEY FOUND IT TO BE HARMLESS, BUT IT DOES INDICATE THAT, EVEN IN BENCH TRIALS, THE RULE IS GOING TO APPLY AND DOES APPLY.

FINALLY, IF THE COURT CONSIDERS DR. MCCART'S TESTIMONY IN LIMITED OR OTHERWISE INADMISSIBLE, THAT WOULD APPLY AT SUMMARY JUDGMENT AS WELL. AND ON THAT, THERE'S NO ARGUMENT.

THE FIRST ISSUE IS THAT DR. MCCART'S TESTIMONY IS IRRELEVANT TO THE ACTUAL CASES OR QUESTIONS BEFORE THE COURT ON SUMMARY JUDGMENT STARTING WITH HER CLAIM OF UNNECESSARY SEGREGATION. UNDER RULE 702 AND DAUBERT, IT IS PLAIN THAT ONLY RELEVANT EVIDENCE IS ADMISSIBLE. AND WHAT THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT SAID IN 2014 DECISION OF DOLGENCORP THAT WE CITE IN OUR BRIEF IS THAT THE -- IN THAT CASE, THEY EXCLUDED OR AFFIRMED THE EXCLUSION OF AN EXPERT'S REPORT BECAUSE THE EXPERT'S, QUOTE, REPORTS ARE ANALYZING THE WRONG PROBLEM AND THEREFORE DO NOT ASSIST THE TRIER OF FACT TO DETERMINE A FACT AT ISSUE IN THE CASE.

JUDGE GODBEY WOOD CITED THAT DECISION IN A 2015 DECISION OF UNITED STATES VERSUS AEGIS THERAPIES. IT WAS A FALSE CLAIMS ACT CASE OR -- AND THERE THE JUDGE WROTE THAT THE PLAINTIFF'S EXPERT'S ANALYSIS AND CONCLUSIONS REST UPON REPEATED AND ERRONEOUS EVALUATIONS OF DEFENDANT'S BILLING

PRACTICES. BY EVALUATING INSTANCES OF CARE UNDER THE SIGNIFICANT IMPROVEMENT STANDARD, THE EXPERTS ANALYZE, QUOTE, THE WRONG PROBLEM. AND IT WAS THEREFORE EXCLUDED.

THE UNITED STATES' RESPONSE BRIEF IN SUPPORT OF DR. MCCART'S TESTIMONY DOES NOT CITE TO OR QUARREL WITH EITHER OF THOSE CONCLUSIONS. SO WE HAVE AGREEMENT THAT IF DR. MCCART HAS APPLIED THE WRONG TEST, THEN HER TESTIMONY SHOULD BE EXCLUDED. AND THE FIRST AREA IS ON UNJUSTIFIED SEGREGATION, AS SHE CALLS IT.

OLMSTEAD SAYS AND IS CLEAR THAT ONLY UNJUSTIFIED ISOLATION IS ACTIONABLE UNDER THE ADA. THAT'S IN BOTH THE PLURALITY DECISION AND IN JUSTICE KENNEDY'S CONTROLLING CONCURRENCE. IN FACT, AS JUSTICE GINSBURG POINTED OUT FOR THE PLAINTIFFS IN THAT CASE -- AND I KNOW WE'VE ALREADY TALKED ABOUT THIS -- THE COURT ACKNOWLEDGED THAT THOSE INDIVIDUAL PLAINTIFFS MAY NEED TO RETURN FOR SOME TIME TO AN ISOLATED SETTING, AND THEN THERE ARE SOME WHO MAY NEVER LEAVE AN ISOLATED SETTING. AND THAT WOULD BE APPROPRIATE.

IT'S THE SPECTRUM THAT REQUIRES THAT INDIVIDUALIZED ANALYSIS THAT WE TALKED ABOUT. SOME FOLKS DON'T MEET ISOLATED SETTINGS AT ALL. SOME FOLKS ALWAYS NEED IT. AND IN BETWEEN IS WHAT REQUIRES THE INDIVIDUALIZED ANALYSIS. WE'VE ALREADY TALKED ABOUT HOW THE ELEVENTH CIRCUIT REAFFIRMED THAT DECISION THAT IT IS UNJUSTIFIED ISOLATION ONLY.

DR. MCCART, HOWEVER, APPLIES A DIFFERENT STANDARD

THAN UNJUSTIFIED ISOLATION. AND, REMEMBER, THE ELEMENTS OF OLMSTEAD SAY IT IS ONLY UNJUSTIFIED IF THE STATE'S TREATING PROFESSIONALS HAVE DETERMINED THAT COMMUNITY PLACEMENT IS APPROPRIATE; NUMBER TWO, THE INDIVIDUAL DOES NOT OBJECT TO COMMUNITY PLACEMENT; AND, THIRD, THE PLACEMENT CAN BE ACCOMMODATED CONSIDERING THE STATE'S RESOURCES AND NEEDS OF THEIR INDIVIDUALS.

DR. MCCART IN HER DEPOSITION -- IT'S PAGE 65, 17 TO 22 -- ANSWERS THE QUESTION THIS WAY: WHAT CONSTITUTES UNNECESSARY SEGREGATION?

ANSWER, WHEN A CHILD IS MOVED AWAY FROM HIS OR HER SCHOOL-AGED PEERS OR SIBLINGS, SET APART FROM OR TREATED DIFFERENTLY THAN STUDENTS WITHOUT DISABILITIES.

THAT IS A PER SE ANALYSIS. AT ANY TIME A CHILD IS MOVED AWAY FROM HIS OR HER SCHOOL-AGED PEERS OR SIBLINGS THAT THAT IS UNJUSTIFIED SEGREGATION.

THAT MAY BE A FINE POLICY DEBATE. THAT MAY BE CERTAINLY ONE THAT CLEARS ON IN THE ACADEMIC REALM. BUT IN TERMS OF THE QUESTION BEFORE THE COURT, IS AN ISOLATED SETTING APPROPRIATE, AND IS IT -- YOU KNOW, PUTTING ASIDE THE WHOLE TREATING PROFESSIONAL ISSUE -- IS IT APPROPRIATE. THE LAW IS FOR THE PURPOSES OF THE ADA THAT IT CAN -- IT IS NOT A PER SE VIOLATION, WHICH IS WHAT DR. MCCART ARTICULATES. SO HER TESTIMONY ON UNJUST ISOLATION APPLIES THE WRONG TEST AND UNDER AEGIS AND DOLGENCORP WOULD BE INADMISSIBLE.

SHE ALSO CONDUCTS A GENERALIZED INQUIRY, WHEREAS WE'VE SPENT TIME DISCUSSING PREVIOUSLY THE ADA REQUIRES AN INDIVIDUALIZED INQUIRY. HER OPINION IN HER DEPOSITION, 178, PAGES 8 TO 12, SHE SAYS: MY OPINION IS THAT THE STATE DEPARTMENT OF EDUCATION IN GEORGIA UNNECESSARILY SEGREGATES STUDENTS EN MASSE.

AND HOW DID SHE COME TO THAT CONCLUSION? SHE DID IT BY REVIEWING ABOUT THREE PERCENT OF THE IEP FILES AND TOURS, ET CETERA. BUT SHE ACKNOWLEDGES SHE DID NOT REVIEW THE VAST MAJORITY OF STUDENTS. AND, THUS, SHE DID NOT CONDUCT THE TYPE OF INDIVIDUALIZED DETERMINATION THAT THE ADA REQUIRES.

AS JUSTICE KENNEDY WROTE IN HIS CONCURRING OPINION, COMPARISONS OF DIFFERENT MEDICAL CONDITIONS AND THE CORRESPONDING TREATMENT REGIMES MIGHT BE DIFFICULT AND WOULD BE ASSESSMENTS OF A DEGREE OF INTEGRATION OF VARIOUS SETTINGS WHICH THE MEDICAL TREATMENT IS OFFERED.

THAT CAN'T HAPPEN, AS KENNEDY WROTE, IN THE ABSTRACT. YET, THAT'S WHAT DR. MCCART HAS DONE.

NOW I'LL GET TO THE ARGUMENT THAT HER EXPERIENCE ALLOWS HER TO DO THAT IN THE METHODOLOGY PIECE. BUT FOR THE PURPOSES OF THIS ANALYSIS, IT IS THAT SHE APPLIED THE WRONG TEST.

IN RESPONSE, THE DOJ MAKES SEVERAL ARGUMENTS. THE FIRST, THOUGH, IS THAT WE AGREE ON THE ELEMENTS OF UNJUSTIFIED ISOLATION. BUT THE DOJ DOES NOT ATTEMPT TO DEFEND DR. MCCART

OR CLAIM THAT SHE HAS PROVIDED THE CORRECT DEFINITION. IN THEIR BRIEF AT PAGE 440, PAGES 21 AND 22, THE DOJ WRITES: NOR IS IT RELEVANT WHETHER DR. MCCART USED THE UNJUSTIFIED LANGUAGE FROM OLMSTEAD IN HER REPORT, AS THE STATE OBJECTS. WHETHER OR NOT AN EXPERT USES A CATCH PHRASE IS IRRELEVANT TO THE ADMISSIBILITY OF HER OPINIONS AS LONG AS THE OPINIONS OFFERED ARE HELPFUL TO THE COURT IN MAKING THOSE LEGAL DETERMINATIONS.

IT'S NOT HELPFUL IF HER DEFINITION OF UNJUST ISOLATION OR UNJUST SEGREGATION, AS SHE CALLS IT, IS PER SE. AND THE LAW GOES THE OTHER WAY. THEY CITE THE BRAGG DECISION FROM THE MIDDLE DISTRICT OF ALABAMA IN 2016 IN SUPPORT OF THEIR ARGUMENT THAT BRAGG IS EASILY DISTINGUISHABLE. BRAGG INVOLVED A CASE WHERE A PHYSICIAN EVALUATED AND SAID THERE WAS A RISK OF HARM FOR PRISONERS AND DID NOT USE THE LEGAL PHRASE SERIOUS RISK OF HARM. AND IT WAS TRULY AT THAT POINT A SEMANTIC ISSUE: WAS IT A RISK OF HARM OR SERIOUS RISK OF HARM.

HERE WE'RE NOT ATTACKING THE USE OR LACK OF USE OF DR. MCCART USING THE RIGHT PHRASE. WHAT WE ARE ARGUING IS THAT HER OPINION OF WHAT CONSTITUTES UNJUSTIFIED SEGREGATION, BY DEFINITION, IS NOT THE DEFINITION THAT THE SUPREME COURT IN THE ELEVENTH CIRCUIT USE WHEN LOOKING AT OLMSTEAD CLAIMS. IT'S NOT A WORD ISSUE. IT'S A MEANING ISSUE.

ON HER GENERALIZED INQUIRY WHERE WE MAKE THAT ARGUMENT, THE DEPARTMENT OF JUSTICE RESPONDS AND SAYS, WELL, THE STATE'S EXPERT, DR. WILEY, SAID HE WOULD DO WHAT DR. MCCART

DID; THEREFORE, IT MUST BE OKAY.

AS YOU WILL HEAR IN THE RESPONSE TO DR. WILEY, THE STATE AGREES THAT IF THE COURT AGREES WITH THE STATE AND SAYS THAT HYPOTHETICAL STUDENTS ARE NOT RELEVANT OR ARE NOT CONSIDERED IN AN ADA ANALYSIS, THAT IT HAS TO BE INDIVIDUALIZED, THEN, YES, DR. WILEY'S TESTIMONY IS NOT GOING TO BE HELPFUL.

BUT AT THAT POINT, DR. PUTNAM AND DR. MCCART'S TESTIMONY WOULD BE EXCLUDED, AND THE UNITED STATES WOULD NOT HAVE SUFFICIENT EVIDENCE TO OVERCOME SUMMARY JUDGMENT.

BUT HERE'S THE OTHER ISSUE WITH THE MIS-RELIANCE THAT THE UNITED STATES HAS ON DR. WILEY'S TESTIMONY. HE WAS ASKED A QUESTION ABOUT A CATEGORICAL INFERENCE. IT CITES HIS DEPOSITION TESTIMONY AT PAGE 76, 3 TO 24. THE QUESTION ASKED WAS: ARE THERE SOME THINGS YOU WOULD AGREE -- OR, EXCUSE ME, ARE THERE SOME THINGS YOU AGREE THAT WOULD MAKE A SEPARATE SETTING CATEGORICALLY INAPPROPRIATE, EVEN IF IT IS OTHERWISE SPECIALIZED.

WHEN THE QUESTION IS FRAMED OF IN TERMS OF A CATEGORY, AGAIN, THAT MAY BE RELEVANT FOR ACADEMIC ISSUES. IT MAY BE RELEVANT FOR POLICY ISSUES. BUT IT'S NOT THE PIECE THAT THE ADA FOCUSES ON OR FUNCTIONS ON. AS KENNEDY SAID, IT CANNOT BE DECIDED IN THE ABSTRACT.

THE NEXT OPINION OF DR. MCCART THAT SHOULD BE DEEMED INADMISSIBLE -- AND IF THE COURT AGREES WITH US ON THIS, THEN

HER ENTIRE FIRST CONCLUSION AND THIRD CONCLUSION ON UNNECESSARY SEGREGATION WOULD GO AWAY. THE NEXT ONE, THOUGH, IS ABOUT THE QUALITY AND QUANTITY OF SERVICES. THIS SPEAKS TO BOTH REASONABLE ACCOMMODATION AND UNNECESSARY SEGREGATION.

THE LEGAL TEST UNDER THE ADA IS NOT BASED ON WHETHER THE QUALITY OF SERVICES ARE SUFFICIENT. WRITING FOR BOTH PLURALITY, JUDGE GINSBURG WROTE: THE ADA DOES NOT, QUOTE, IMPOSE ON STATES A STANDARD OF CARE FOR WHATEVER MEDICAL SERVICES THEY RENDERED, NOR DOES THE ADA REQUIRE STATES TO PROVIDE A CERTAIN LEVEL OF BENEFITS TO INDIVIDUALS WITH DISABILITIES.

JUSTICE KENNEDY'S CONCURRENCE SAYS THE SAME THING ABOUT QUANTITY OF SERVICES AT PAGES 612 TO 613. IT FOLLOWS THAT A STATE MAY NOT BE FORCED TO CREATE COMMUNITY TREATMENT PROGRAMS WHERE NONE EXIST.

DR. MCCART, THOUGH, OPINES ON QUALITY, AND IT IS CLEAR THAT HER CONCLUSIONS ARE BASED ON HER CONSIDERATIONS OF QUALITY. IN HER DEPOSITION AT PAGE 172, LINE 19 TO 173-3, WE HAVE THIS EXCHANGE: QUOTE, QUESTION, IS THE STATE DEPARTMENT OF EDUCATION PROVIDING INSUFFICIENT QUALITY IN TERMS OF THE SUPPORT SERVICES THAT ARE PROVIDED TO STUDENTS WITH EMOTIONAL OR BEHAVIORAL DISABILITIES.

ANSWER: INASMUCH AS IT'S UTILIZING, AS IT RELATES TO THE GNETS PROGRAM, YES.

SO WHEN SHE CRITICIZES THE GNETS PROGRAM FOR AN

INSUFFICIENT QUALITY OF SERVICES, THAT'S IRRELEVANT TO THE QUESTION OF WHETHER THERE'S BEEN AN ADA VIOLATION. THERE MAY BE OTHER STATUTES THAT ADDRESS THAT. BUT IT IS NOT INDICATIVE OF AN ADA VIOLATION UNDER TITLE II. AND THE SUPREME COURT HAS MADE THAT CLEAR.

SHE ALSO DIS-APPLIES TO HER EDUCATIONAL OPPORTUNITIES ANALYSIS AS WELL. IN HER DEPOSITION AT PAGE 235, LINE NINE, SHE SAYS: SO THERE ARE MANY REASONS, INCLUDING CONCERNS WITH THE QUALITY OF THE PROGRAM AND THE OUTCOMES EXPERIENCED BY STUDENTS IN THE PROGRAM. SHE CONTINUED OR SAID EARLIER AT PAGE 175 THAT THE STATE DOE, QUOTE, FAILED TO PROVIDE EFFECTIVE SUPPORTS, PROFESSIONAL LEARNING, TECHNICAL ASSISTANCE, GUIDANCE, AND VISION FOR STUDENTS IN THE GNETS PROGRAM.

THIS IS A QUALITATIVE ANALYSIS THAT THE SUPREME COURT HAS SAID DOES NOT INDICATE ANYTHING FOR AN ADA CLAIM.

NOW, DR. MCCART'S OPINIONS ON QUANTITY ARE A LITTLE BIT MIXED. IT COULD BE THAT WE DON'T HAVE AN ISSUE. I ASKED HER AT PAGE 172: IS IT YOUR OPINION, AS REFLECTED IN YOUR REPORT, THAT THE STATE OF GEORGIA DEPARTMENT OF EDUCATION PROVIDES AN INSUFFICIENT NUMBER OF SUPPORT SERVICES AND INSUFFICIENT QUANTITY OF SUPPORT SERVICES TO STUDENTS WITH EMOTIONAL BEHAVIORAL DISABILITIES.

ANSWER: THAT'S NOT REFLECTED IN MY REPORT.

SO IF THE UNITED STATES IS NOT SEEKING TO USE HER TO SAY THAT THE STATE SHOULD EXPAND SERVICES, THAT IT OFFERS AN

INSUFFICIENT NUMBER OF SERVICES, THEN WE MAY NOT HAVE AN ISSUE. THE PROBLEM IS, IT'S UNCLEAR WHAT BOTH HER TESTIMONY AND THE POTENTIAL USE OF IT IS.

HER REPORT SAYS AT PAGE 151 THAT GNETS PROGRAM TEACHERS AND STAFF HAVE NOT BEEN GIVEN THE TOOLS, RESOURCES, OR TRAINING NEEDED TO UNDERSTAND AND IMPLEMENT EFFECTIVE INTERVENTIONS AS DR. MCCART DEFINES THEM. AND SO THERE IS A FUNDAMENTAL LACK OF TRAINING, TOOLS, AND RESOURCES.

WELL, IF THAT LACK IS RESOLVED BY PROVIDING MORE, THAT'S THE QUANTITY-OF-SERVICES ARGUMENT THAT IS NOT RELEVANT TO AN ADA CLAIM. THE REPORT SAYS THERE ARE ALSO, QUOTE, INSUFFICIENT RESOURCES, INCLUDING A LACK OF CERTIFIED BEHAVIORAL AND THERAPEUTIC STAFF AND RESOURCES TO SUPPORT STUDENTS, REPORT AT PAGE 160.

SO, AGAIN, IF THE UNITED STATES IS SEEKING TO USE THAT TESTIMONY TO SAY THAT THE STATE NEEDS TO PROVIDE MORE BEHAVIORAL AND THERAPEUTIC STAFF, MORE RESOURCES, MORE TRAINING, THAT'S NOT RELEVANT TO AN ADA CLAIM, AND HER TESTIMONY SHOULD NOT BE THERE.

IN RESPONSE, THE UNITED STATES ACKNOWLEDGES THAT IT'S USING DR. MCCART'S OPINION TO ESTABLISH LIABILITY BASED ON HER TESTIMONY ON QUALITY AND QUANTITY. BUT, AGAIN, IT'S UNCLEAR IF THAT'S ACTUALLY WHAT DR. MCCART'S DOING.

IN THEIR BRIEF AT DOCKET 440, PAGE TEN, THEY SAY, WHETHER THE STATE IS PROVIDING THE QUALITY AND SCOPE OF

SERVICES NEEDED TO APPROPRIATELY SERVE STUDENTS WITH BEHAVIORAL-RELATED DISABILITIES AND PREVENT UNNECESSARY SEGREGATION AND DENIAL OF EQUAL EDUCATIONAL OPPORTUNITIES IS CLEARLY RELEVANT.

THAT'S NOT THE CASE. AND OLMSTEAD MAKES THAT CLEAR.

THEY ALSO TALK ABOUT A, QUOTE, GROSS LACK OF MENTAL HEALTH AND THERAPEUTIC EDUCATIONAL SERVICES AND SUPPORTS. BUT, ONCE AGAIN, THE UNITED STATES' BRIEF DOES NOT CHALLENGE THE STATE'S INTERPRETATION OF OLMSTEAD. IN FACT, THE SECTION ON THE BRIEF CITES TO NO CASE LAW OR REGULATION OR STATUTE AT ALL.

NEXT WOULD BE DR. MCCART'S TESTIMONY ON REASONABLE ACCOMMODATIONS. HERE, TOO, SHE APPLIES THE WRONG STANDARD. UNDER THE ADA -- AND THIS IS -- THIS IS TO HER POINT THAT THE UNITED STATES ARGUES, BOTH IN ITS MERITS BRIEF ON SUMMARY JUDGMENT, THAT THE ACCOMMODATIONS IT SEEKS ARE REASONABLE, AND CITES TO DR. MCCART'S REPORT AND ALSO DR. MCCART'S STATEMENT THAT WHAT SHE PROFFERS IS REASONABLE.

NOW, WE'VE ALREADY HAD THE DEBATE ABOUT WHETHER REASONABLE ACCOMMODATION IS A PRIMA FACIE ELEMENT. IT IS. AND I DON'T THINK THERE'S DISAGREEMENT ABOUT THAT. WE STILL DISAGREE ABOUT THE -- WHETHER BIRCOLL FROM THE ELEVENTH CIRCUIT IS BINDING WHEN IT SAYS THAT WHAT IS REASONABLE MUST BE DECIDED ON A CASE-BY-CASE BASIS.

WE HAVE ALSO ARGUED, CITING OLMSTEAD, IN NOTE 16 OF THE PLURALITY OPINION, THAT CONSIDERATIONS OF REASONABLENESS

REQUIRE, PARTICULARLY IN CASES LIKE THIS WHEN YOU'RE LOOKING AT SOCIAL SERVICES, CONSIDERATIONS OF COST AND WORKFORCE. DR. MCCART'S REPORT MAKES FIVE RECOMMENDATIONS FOR THE DEPARTMENT OF EDUCATION.

AND, JUST FOR CONTEXT, SHE SAYS SHE DID NOT LOOK AT OR STUDY THE DEPARTMENT OF COMMUNITY HEALTH OR THE DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL DISABILITIES. SO WHEN I KEEP SAYING DOE, THAT'S BECAUSE THAT'S WHAT HER REPORT FOCUSED ON. AND SHE TESTIFIED THAT HER RECOMMENDATIONS ARE REASONABLE ACCOMMODATIONS. IT'S IN THE DEPOSITION AT PAGE 81.

SHE ALSO CONCEDED, THOUGH, THAT HER RECOMMENDATIONS ARE, QUOTE, NOT EASY AND WOULD LOOK DIFFERENT IN STATES WHERE SHE HAS EXPERIENCE. HERE SHE DID NOT OFFER THE INDIVIDUALIZED APPROACH THAT THE ELEVENTH CIRCUIT DEMANDED AND, THEREFORE, ONCE AGAIN, SHE APPLIED THE WRONG TEST. NOR DID SHE CONSIDER QUESTIONS OF COSTS AND WORKFORCE, DESPITE THAT SHE TESTIFIED, COST IS RELEVANT IN A GENERAL SENSE, ON PAGE 43, AND THAT SHE DID NOT CONSIDER COST, PAGE 162.

SHE ALSO TESTIFIED THAT WORKFORCE AVAILABILITY IS, QUOTE, ALWAYS A FACTOR, BUT DID NOT PERFORM ANY WORKFORCE ANALYSIS. SHE'S NOT EVEN APPLYING HER OWN TEST.

THE UNITED STATES RESPONDS ON THE INDIVIDUALIZED APPROACH BY, ONCE AGAIN, NOT ADDRESSING OLMSTEAD. THEY ADDRESS THE BIRCOLL CASE ONCE -- AND I THINK THIS IS THE ONLY TIME IN THE BRIEFING THAT IT DOES -- PAGE 440, PAGE 13, NOTE FIVE. AND

IT SAYS: WHILE REASONABLENESS IS INDEED DETERMINED ON A CASE BY CASE, NOTHING IN BIRCOLL OR ANY DECISION CITED BY THE STATE SUGGESTS THAT REASONABLENESS CAN ONLY BE DETERMINED ON AN INDIVIDUAL RATHER THAN SYSTEMIC LEVEL.

YOUR HONOR, THAT'S JUST HARD TO SQUARE WITH THE SENTENCE, WHAT IS REASONABLE MUST BE DETERMINED ON A CASE BY CASE BASED ON NUMEROUS FACTORS. AND IF YOU LOOK AT THE CASES -- AND WE CITE THEM IN OUR BRIEF -- THAT HAVE CITED BIRCOLL IN THE ELEVENTH CIRCUIT, THEY DO SO FOR THIS PURPOSE, BECAUSE UNDER THE ADA, WHAT CONSTITUTES REASONABLE FOR ONE PERSON MAY NOT BE REASONABLE FOR ANOTHER.

NOW, IF WE'RE TALKING AGAIN ABOUT RAMPS AND ENTRYWAY THINGS, THAT YOU CAN MAKE MORE OF AN ARGUMENT. BUT AS THE OLMSTEAD DECISION AND THE MISSISSIPPI DECISION MAKE EXPLICITLY CLEAR, WHEN DEALING WITH EDUCATION OR MENTAL HEALTH ISSUES, THE TREATMENT PLAN IS GOING TO VARY. THE MEDICATION IS GOING TO VARY. THE SERVICE THAT IS APPROPRIATE IS GOING TO VARY. EVEN DR. MCCART AND DR. PUTNAM AGREE.

NOW, DR. MCCART ALSO SAYS HER RECOMMENDATIONS ARE REASONABLE, BUT THIS IS HOW SHE DESCRIBES THEM. IT WOULD BE A FUNDAMENTAL REDESIGN -- DEPOSITION, PAGE 93 -- REQUIRING REORGANIZED SYSTEMS, STRUCTURES, AND RESOURCES.

DEPOSITION 276, EXTENSIVE PROFESSIONAL LEARNING AND INTENSIVE TECHNICAL ASSISTANCE.

DEPOSITION 266, WHEN ASKED HOW HER EXPERIENCE WITH

OTHER STATES HAS ALLOWED HER TO MAKE THE CONCLUSION THAT THIS IS REASONABLE -- AND I REALIZE THIS IS BLEEDING INTO THE METHODOLOGY PIECE -- SHE COULD NOT IDENTIFY A STATE THAT HAS ACHIEVED WHAT SHE'S RECOMMENDED, SO SHE CAN'T SAY MY EXPERIENCE SAYS THAT THIS IS REASONABLE AND THEN NOT BE ABLE TO SAY THE BASIS OF THAT EXPERIENCE. AND WE'LL GET INTO THAT IN A MOMENT.

AND SHE ACKNOWLEDGES SHE DOES NOT KNOW IF HER RECOMMENDATION COULD BE IMPLEMENTED IN GEORGIA, PAGE 468, LINE 20; 269, LINE THREE.

THE UNITED STATES THEN SAYS THAT WHAT WE'RE REALLY TALKING ABOUT HERE IS THE UNDUE BURDEN DEFENSE AND NOT THE REASONABLE ACCOMMODATION DEFENSE.

THEY ALSO SAY AT ONE POINT THAT WE DIDN'T PLEAD THAT. BUT THE ONLY COURT THAT HAS ACTUALLY LOOKED AT WHETHER YOU HAVE TO PLEAD AN UNDUE BURDEN DEFENSE IN YOUR ANSWER HAS SAID, OF COURSE NOT, AND THE REASON IS BECAUSE YOU DON'T KNOW WHAT THE REMEDY OF THE -- THE REQUIREMENT OR THE REASONABLE ACCOMMODATION THAT IS BEING PROFFERED IS, AND IT WOULD BE INAPPROPRIATE TO PLEAD IT WITHOUT KNOWING THAT.

AND WE, IN FACT, FILED IN OUR MOTION TO DISMISS THAT THE REQUEST FOR RELIEF WAS INVALID BECAUSE IT WAS JUST AN OBEY-THE-LAW INJUNCTION REQUEST. BUT THE PROBLEM WITH THE UNITED STATES' ARGUMENT IS THAT, AS WE CITED BEFORE, THE WILLIS CASE FROM THE ELEVENTH CIRCUIT IN 1997. THEY SAY THERE THAT THE EVIDENCE PROBATIVE OF AN ISSUE OF WHETHER AN ACCOMMODATION

FOR AN EMPLOYEE IS REASONABLE WILL OFTEN BE SIMILAR OR IDENTICAL TO THE EVIDENCE OF THE PROBATIVE OF THE ISSUE OF WHETHER THE RESULTING HARDSHIP FOR THE EMPLOYER IS UNDUE.

THAT DOES NOT CHANGE THE FACT THAT ESTABLISHING THAT A REASONABLE ACCOMMODATION EXISTS IS PART OF AN ADA PLAINTIFF'S CASE, WHEREAS UNDUE HARDSHIP IS AN AFFIRMATIVE DEFENSE. IT DOESN'T MATTER IF IT LOOKS AT THE SAME FACTORS. IT IS THE BURDEN ON THEM.

NEXT, YOUR HONOR, HER DECISIONS -- HER OPINIONS ARE NOT HELPFUL. AND I'LL BE VERY BRIEF ON THIS. IT'S SIMPLY A QUESTION THAT SHE RECOMMENDS THAT THE DEPARTMENT OF EDUCATION IMPLEMENT AND PROVIDE TRAINING ON HER MODEL OF WHAT SHE CALLS EQUITY-BASED MTSS. BUT SHE ACKNOWLEDGES -- AND WE CITE IN OUR BRIEF -- THAT SHE DOESN'T KNOW WHAT THE STATE IS DOING IN REGARDS TO THIS.

NOW, THE DEPARTMENT OF JUSTICE SAYS, BUT HER REVIEW IS VERY EXTENSIVE, FROM PAGE 40 -- OR, EXCUSE ME, DOCKET 440, NOTE 16. BUT THAT DOESN'T OVERCOME THE STATEMENT IN HER DEPOSITION THAT SHE DOESN'T KNOW WHAT THE STATUS IS OF WHAT SHE'S RECOMMENDING.

NEXT, YOUR HONOR, DR. MCCART'S METHODOLOGY CANNOT SATISFY THE REQUIREMENTS OF RULE 702. NOW, THIS IS NOT, WE WILL CONCEDE, A TRADITIONAL DAUBERT CASE. IT'S NOT AN ENGINEER. IT'S NOT A MOLD EXPERT OR SOMETHING OF THAT NATURE. BUT, CLEARLY, NONE OF THE DAUBERT FACTS APPLY. AND WE'VE PUT

THAT IN OUR BRIEF.

SHE -- SHE HAS NOT INDICATED HER REVIEW HAS BEEN TESTED. SHE HAS NOT SHOWN THAT THE CRITERIA THAT SHE MADE -- SHE KIND OF CREATED A CHART WITH A BUNCH OF DIFFERENT FACTORS LOOKING AT WHETHER THAT CONSTITUTES INSTITUTIONALIZATION, HAS NOT BEEN SUBJECT TO PEER REVIEW. THERE'S BEEN NO IDENTIFIED RATES OF ERROR. AND, SIMILARLY, IT'S NOT GAINING AT ALL, ACCEPTING CONCLUSORY SENTENCES OR STATEMENTS AT BEST. BUT WE'LL ACKNOWLEDGE THAT THIS IS NOT THE SCIENTIFIC THAT DAUBERT APPLIES TO. IT'S MORE A FRAZIER CASE, BECAUSE WHAT DR. MCCART IS REALLY RELYING ON IS HER EXPERIENCE. BUT THE ELEVENTH CIRCUIT MADE VERY CLEAR HERE, TOO, THAT AN EXPERT MAY BE QUALIFIED -- WE ARE NOT SAYING DR. MCCART IS NOT QUALIFIED -- BY EXPERIENCE, BUT THAT DOES NOT MEAN THAT EXPERIENCE STANDING ALONE IS SUFFICIENT FOUNDATION RENDERING RELIABLE ANY CONCEIVABLE OPINION. THE BURDEN IS, THE WITNESS MUST EXPLAIN, QUOTE, HOW THAT EXPERIENCE LEADS TO THE CONCLUSION REACHED, WHY THAT EXPERIENCE IS A SUFFICIENT BASIS FOR THE OPINION, AND HOW THE EXPERIENCE IS RELIABLY APPLIED TO THE FACTS.

THIS COURT IN THE SCHEINFELD DECISION FROM 2020 DEALT WITH AN EXPERT THAT SAID: I APPLIED THE SCIENTIFIC METHOD. AND IT WAS A MOLD EXPERT. AND THIS COURT PROPERLY DEEMED THAT ARTICULATION INSUFFICIENT. AND THE EXPERT WAS NOT ALLOWED TO RELY SIMPLY ON HIS EXPERIENCE BECAUSE IT WOULD, AS THIS COURT SAID IN THE AMERICAN PEGASUS CASE FROM 2016, RULE 702 REQUIRES

MORE THAN SIMPLY TAKING THE EXPERT'S WORD FOR IT. YET, THAT'S EXACTLY WHAT DR. MCCART ASKS THE COURT TO DO -- OR THE DEPARTMENT DOES.

DR. MCCART'S ANALYSIS IN DETERMINING HER METHODOLOGY IS DIFFICULT. IT'S A 167-PAGE REPORT. THERE ARE TWO PAGES WHERE SHE CITES OUTSIDE AUTHORITY. AND WHEN I ASKED HER ABOUT THOSE AUTHORITY IN HER DEPOSITION, SHE COULDN'T RECALL THE SPECIFICS OF THEM AND SPOKE TO THEM IN GENERAL TERMS, AT BEST. IT IS TRULY A MASSIVE REPORT WITH A LOT OF CONCLUSIONS THAT CITES TO NOTHING TO SUPPORT THEM. SO IT MAKES IT DIFFICULT.

THE ARTICULATION MAKES IT DIFFICULT AS WELL. HER REPORT AT PAGE 84 DESCRIBES SAD CLASSROOMS AND WHETHER SAD CLASSROOMS MAKE FOR INEQUITABLE EDUCATIONAL OPPORTUNITIES. THERE'S NO ARTICULATED METHODOLOGY TO DETERMINE THAT.

SIMILARLY, SHE SAID SHE COULD FEEL SADNESS FROM PARENTS. AGAIN, THIS -- I'M NOT CRITICIZING THAT, HER SINCERITY OR ANYTHING OF THAT NATURE -- BUT WHEN IT COMES TO APPLYING RULE 702 AND IF SHE'S GOING TO USE THAT EXPERIENCE IN FEELING SADNESS FROM PARENTS AS A BASIS TO ESTABLISH LIABILITY UNDER THE ADA, THAT'S WHY IT DOESN'T SATISFY RULE 702. IF SHE WANTED TO TESTIFY AS A LAY WITNESS ABOUT HER OWN OPINIONS FROM DOING THIS, THAT MAY BE A SEPARATE ISSUE. CERTAINLY NOT SAYING IT WOULD BE APPROPRIATE. BUT IT'S NOT APPROPRIATE EXPERT TESTIMONY.

SHE HAD CONCERNS ABOUT POSTERS, WRITINGS ON THE WALL,

AND SEPARATE ENTRANCES. BUT THERE'S NO METHODOLOGY USED TO DETERMINE WHAT THAT IS. THERE IS NO EXPLANATION OF HOW THE REVIEW OF 65 TO 100 IEP'S AND EVEN WHAT METHODOLOGY SHE USED. SHE DID NOT SAY: HERE'S THE FACTORS I LOOKED FOR AND HERE IS WHAT I DECIDED. IT WAS, I'M DR. MCCART AND I'M AN EXPERT, BECAUSE I KNOW EXACTLY THIS FIELD. AND NO QUESTION SHE DOES. BUT TO TESTIFY, SHE HAS TO EXPLAIN HER METHODOLOGY.

THIS COURT SAID IN SCHEINFELD THAT CONCLUSORY STATEMENTS ABOUT OPINIONS ARE INSUFFICIENT. AND IF IT REAPPLIES THE SCHEINFELD DECISION, DR. MCCART SHOULD NOT BE ABLE TO TESTIFY.

SHE HAS NO EXPLANATION OF HOW, WHY HER EXPERIENCE IN OTHER STATES LED TO HER CONCLUSIONS HERE, PARTICULARLY WHEN SHE COULDN'T ARTICULATE WHAT OTHER STATES HAVE DONE WHAT GEORGIA -- SHE'S TELLING GEORGIA, A, IT MUST DO AND, B, WOULD BE REASONABLE.

SHE HAS NO POPULATION COMPARISONS WITH OTHER STATES, NO IDEAS IF OTHER STATES HAVE SUGGESTED IT, YET, ACKNOWLEDGES THAT GEORGIA IS DIFFERENT. THE COUNTER-ANALYSIS FROM THE DEPARTMENT, AGAIN, FOCUSES ON DR. WILEY, BUT THE SAME ARGUMENTS APPLY THERE. IF YOU ASK A CATEGORICAL QUESTION, YOU'LL GET A CATEGORICAL ANSWER.

AND WITH THAT, I'LL RESERVE MY REMAINING TIME FOR REBUTTAL.

THE COURT: ALL RIGHT. THANK YOU.

MR. BELINFANTE: THANK YOU.

THE COURT: I AGREE WITH A STATEMENT THAT YOU MADE, THAT THIS IS -- IT'S DIFFERENT TRYING TO APPLY DAUBERT IN THIS CONTEXT, VERY DIFFERENT THAN WHAT I'M ACCUSTOMED TO.

MR. BELINFANTE: RIGHT.

THE COURT: STANDING ARGUMENTS, IT'S HARD FOR ME TO -- AND THIS MAY APPLY TO YOU ALL, TOO -- BUT IT'S HARD FOR ME TO IMAGINE IS AN EXPERT WITH WHOM YOU WOULD AGREE IN THIS CONTEXT UNLESS THEY HAVE THE EXACT OPINIONS OF YOU. BUT I'M GOING TO HEAR YOU ALL OUT. SO GO AHEAD.

MR. GILLESPIE: MAY IT PLEASE THE COURT --

THE COURT: YES, SIR.

MR. GILLESPIE: -- COUNSEL, MATTHEW GILLESPIE FOR THE UNITED STATES.

DR. MCCART HAS DEDICATED HER ALMOST 40-YEAR CAREER WORKING TO MEET THE BEHAVIORAL AND EDUCATIONAL NEEDS OF STUDENTS WITH DISABILITIES. DR. MCCART HAS WORKED AS A TEACHER, A BEHAVIORAL CRISIS CONSULTANT, A PROFESSOR OF SPECIAL EDUCATION AND APPLIED BEHAVIOR ANALYSIS, A SPECIAL EDUCATION RESEARCH PROFESSOR WITH THE PRESTIGIOUS LIFE SPAN INSTITUTE, A CONSULTANT FOR STATE AND LOCAL EDUCATION AGENCIES ON MULTI-TIERED SYSTEMS OF SUPPORTS, OR MTSS, AND CODIRECTOR AND PRINCIPAL INVESTIGATOR FOR THE SWIFT EDUCATION CENTER OF THE UNIVERSITY OF KANSAS.

DR. MCCART'S EXPERIENCES INCLUDE WORKING TO

DEINSTITUTIONALIZE INDIVIDUALS WITH DISABILITIES BY DEVELOPING ALTERNATIVE COMMUNITY-BASED LIVING AND LEARNING OPPORTUNITIES. SHE HAS SPENT SIGNIFICANT AMOUNTS OF HER TIME AND HER CAREER WORKING IN AND AROUND INSTITUTIONS, IN FACILITATING THE TRANSITION OF INDIVIDUALS WITH DISABILITIES TO MORE INCLUSIVE ENVIRONMENTS. IN OTHER WORDS, DR. MCCART KNOWS WHEN SEGREGATION IS AND IS NOT NECESSARY AND HOW TO MEET STUDENTS' NEEDS WITHOUT NEEDLESSLY SEPARATING THEM FROM THEIR FRIENDS, THEIR FAMILY, AND THEIR COMMUNITY.

OVER HER CAREER, DR. MCCART HAS WORKED BOTH DIRECTLY AND INDIRECTLY WITH MANY THOUSANDS OF CHILDREN. AND THE IMPACT OF HER WORK HAS AFFECTED AND CONTINUES TO AFFECT MANY THOUSANDS MORE.

DR. MCCART IS ALSO A CELEBRATED ACADEMIC. AND HER WRITINGS INCLUDE DOZENS OF ARTICLES, CHAPTERS, AND BOOKS OUTLINED IN HER CV FROM 1999 TO PRESENT.

DR. MCCART BROUGHT THE FULL BREADTH OF HER KNOWLEDGE AND EXPERIENCE TO BEAR IN HER METICULOUS AND EXACTING WORK IN THIS CASE. OVER THE COURSE OF NEARLY A YEAR AND A HALF, DR. MCCART SPENT APPROXIMATELY SEVEN WEEKS CONDUCTING 70 SITE VISITS TO GNETS PROGRAM SITES, INCLUDING TO 23 OF THE STATE'S 34 STAND-ALONE CENTER-BASED GNETS PROGRAM SITES, AND THREE DOZEN SCHOOL DAYS GNETS PROGRAM SITES.

IN ADVANCE OF THESE SITE VISITS, DR. MCCART WOULD OFTEN REVIEW INFORMATION ABOUT BOTH THE SITE ITSELF AND THE

STUDENTS ASSIGNED THERE.

DR. MCCART WOULD ALSO OFTEN ASK ABOUT PARTICULAR CLASSROOMS OR STUDENTS ON THE TOUR AS PERMITTED, OR WOULD EVEN CROSS-REFERENCE SPECIFIC STUDENT FILES AFTER OBSERVING THOSE STUDENTS OVER THE COURSE OF HER DAY.

AS PART OF THESE VISITS, DR. MCCART VISITED AND OBSERVED HUNDREDS OF STUDENT CLASSROOMS. SHE SPENT BETWEEN TEN AND 90 MINUTES IN EACH ONE, DURING WHICH DR. MCCART CAREFULLY OBSERVED NEARLY 1,000 STUDENTS ASSIGNED TO THE GNETS PROGRAM.

USING HER VAST EXPERIENCE WORKING IN SPECIAL EDUCATION WITH STUDENTS WITH BEHAVIOR-RELATED DISABILITIES, DR. MCCART WAS ABLE TO DRAW CONCLUSIONS FROM THESE OBSERVATIONS ABOUT STUDENT NEEDS, THE DEGREE AND NATURE OF SUPPORTS AND SERVICES PROVIDED, AND HOW WHAT SHE OBSERVED SHOWED HER THAT STUDENTS IN THE GNETS PROGRAM ON A WHOLE HAD THE SAME EMOTIONAL, BEHAVIORAL, AND EDUCATIONAL NEEDS AS THE STUDENTS DR. MCCART HAS WORKED WITH AND FOR THROUGHOUT HER CAREER.

DR. MCCART'S ANALYSIS WAS FURTHER INFORMED BY HER REVIEW OF HUNDREDS OF STUDENT FILES, INCLUDING INDIVIDUALIZED EDUCATION PLANS, FUNCTIONAL BEHAVIORAL ASSESSMENTS, AND BEHAVIOR INTERVENTION PLANS.

SHE ALSO ATTENDED OR REVIEWED DEPOSITION TESTIMONY FOR A DOZEN WITNESSES, INCLUDING VARIOUS STATE AGENCY PERSONNEL AND REGIONAL GNETS PROGRAM DIRECTORS.

USING HER VAST EXPERIENCE, HER ACADEMIC BACKGROUND,

AND OBSERVATIONS AS HER BASIS, DR. MCCART SET FORTH HER FINDINGS AND OPINIONS IN A 167-PAGE REPORT, EXCLUSIVE OF APPENDICES. AND THIS REPORT INCLUDES BACKGROUND INFORMATION, DETAILS OF HER METHODOLOGY, KEY ANALYSES, CLUSTER OF EXAMPLES, PHOTOGRAPHS, OBSERVATIONS, AND DOCUMENTARY SUPPORT, AND CULMINATES IN A SERIES OF RECOMMENDATIONS GEARED TOWARD HAVING THE STATE LEVERAGE AND EXPAND EXISTING RESOURCES TO REMEDY AND PREVENT UNNECESSARY SEGREGATION AND UNEQUAL EDUCATIONAL OPPORTUNITIES FOR STUDENTS WITH DISABILITIES. IN OTHER WORDS, IT IS ANYTHING BUT ABSTRACT.

THIS REPORT AND DR. MCCART'S TESTIMONY WILL PROVIDE THE COURT WITH CRITICAL CONTEXT BASED ON THE KNOWLEDGE AND OBSERVATIONS OF AN IMMINENTLY QUALIFIED SPECIAL EDUCATION PROFESSIONAL ON HOW STUDENTS ASSIGNED TO THE GNETS PROGRAM COULD BE APPROPRIATELY SERVED IN INTEGRATED ENVIRONMENTS AND REASONABLE MODIFICATIONS THE STATE COULD MAKE TO MEET THAT END.

DESPITE THIS, THE STATE HAS FILED AN EXPANSIVE MOTION ASKING THIS COURT TO EXCLUDE DR. MCCART'S TESTIMONY IN ITS ENTIRETY, ARGUING IT IS IRRELEVANT, UNHELPFUL, AND CRITICALLY DEFICIENT.

AS I'LL DISCUSS, THESE ARGUMENTS FAIL TO FIND SUPPORT IN FACT OR IN LAW, AND ALL OF THE ARGUMENTS, AT THEIR BEST, GO TO WEIGHT RATHER THAN ADMISSIBILITY. AS A RESULT, FOR THE REASONS SET FORTH IN OUR BRIEF AND I'LL DISCUSS HERE SHORTLY, THE STATE'S MOTION SHOULD BE DENIED IN ITS ENTIRETY.

THE STATE'S FIRST ARGUMENT IS THAT DR. MCCART'S OPINIONS ON THE QUALITY AND SCOPE OF BEHAVIORAL HEALTH SERVICES PROVIDED IN THE GNETS PROGRAM ARE IRRELEVANT TO THE ISSUES BEFORE THE COURT FOR TWO REASONS: ONE, BECAUSE THEY AMOUNT TO AN IMPROPER IMPOSITION OF A STANDARD OF CARE; AND, TWO, BECAUSE THEY REQUIRE THE CREATION OF NEW PROGRAMS. NEITHER ARGUMENT IS AVAILING.

ON THE ONSET, I WANT TO NOTE THAT, WHILE WE AGREE THAT OLMSTEAD DOESN'T ALLOW FOR US TO REQUIRE A QUALITY OF SERVICES OR STANDARD OF CARE, OLMSTEAD DOES ALLOW FOR EXPANSION OF ACCESS TO SERVICES. MANY COURTS HAVE REQUIRED THE EXPANSION OF SERVICES AS A REMEDY IN OLMSTEAD CASES.

NOW, WHILE CERTAINLY TRUE THAT DR. MCCART'S REPORT DOES INCLUDE EXTENSIVE ANALYSES OF THE GNETS PROGRAM'S FAILURE TO PROVIDE ADEQUATE BEHAVIORAL HEALTH SERVICES TO ITS STUDENTS, NONE OF THIS EXPERT TESTIMONY AMOUNTS TO REQUIRING A STANDARD OF CARE. INSTEAD, DR. MCCART REPEATEDLY HIGHLIGHTS NUMEROUS DEFICIENCIES WHERE THE UNITED STATES CONTENDS THE STATE IS FAILING TO ADHERE TO ITS NONDISCRIMINATION OBLIGATIONS FOR SERVICES THE STATE DOES ALREADY PROVIDE, WHICH THE COURT IN OLMSTEAD RECOGNIZED IS THE CRUX OF AN OLMSTEAD CLAIM.

WHILE THE STATE FAILS WHERE -- WHAT THE STATE FAILS TO APPRECIATE IS THAT DR. MCCART'S FINDINGS ARE NOT ABOUT IMPOSING A STANDARD OF CARE, BUT IT'S INSTEAD ABOUT THE QUALITY OF EDUCATIONAL OPPORTUNITIES. AS JUST ONE EXAMPLE AND AS

REFERENCED EARLIER TODAY, ON PAGE 137 OF HER REPORT, DR. MCCART WROTE THAT, FOR THE '21-'22 SCHOOL YEAR, THE GNETS PROGRAM HAD FEWER THAN 16 CLINICALLY-TRAINED THERAPISTS, PSYCHIATRISTS, OR PSYCHOLOGISTS STATEWIDE SERVING THE STUDENT POPULATION OF OVER 3,000 STUDENTS SPREAD ACROSS 157 GNETS SITE LOCATIONS. AS SHE WROTE, QUOTE, NOT ONLY IS THIS UNREASONABLE, IT ALSO MAKES IT IMPOSSIBLE TO PROVIDE EFFECTIVE SUPPORTS TO STUDENTS IN THE GNETS PROGRAM.

NOT ONLY DO ANALYSES SUCH AS THESE NOT IMPOSE A STANDARD OF CARE, MANY OF THEM ARE ALSO ENTIRELY CONSISTENT WITH THE STATE'S OWN LANGUAGE IN THE GNETS RULE. FOR EXAMPLE, RELEVANT TO THAT EXAMPLE IN PARTICULAR, THE GNETS RULE PROVIDES THAT, QUOTE, GNETS WILL BE STAFFED TO MEET THE NEEDS OF A UNIQUE POPULATION OF STUDENTS REQUIRING INTENSIVE INDIVIDUALIZED SUPPORTS, INCLUDING PROVIDING APPROPRIATE THERAPEUTIC SERVICES IDENTIFIED IN THE IEP.

CONTRARY TO STATE'S ARGUMENTS, THIS TYPE OF ANALYSIS IS CLEARLY RELEVANT, AS IT ILLUSTRATES HOW THE STATE'S FAILURE TO PROVIDE ADEQUATE SUPPORTS AND SERVICES DEPRIVES STUDENTS WITH DISABILITIES IN THE GNETS PROGRAM OF EQUAL EDUCATIONAL OPPORTUNITIES AND RESULTS IN UNNECESSARY PLACEMENT OF STUDENTS IN SEGREGATED GNETS SETTINGS.

THE STATE ALSO ALLEGES THAT DR. MCCART'S FINDINGS AND ANALYSIS IMPERMISSIBLY REQUIRED THE CREATION OF NEW PROGRAMS BY THE STATE IN CONTRAVENTION OF OLMSTEAD. WHEN GIVEN A CLOSER

LOOK, HOWEVER, NOT ONLY IS THIS ARGUMENT LACKING MERIT, BUT THE LOGICAL EXTENSION OF THE STATE'S POSITION IS TROUBLING.

ON PAGE 15 OF ITS ORIGINAL BRIEF, THE STATE SPECIFICALLY CALLS OUT LANGUAGE IN DR. MCCART'S REPORT THAT GNETS STAFF, QUOTE, LACKED AN UNDERSTANDING OF AND MUST BE TRAINED IN INTENSIVE INTERVENTIONS, TRAUMA-INFORMED PRACTICES, RESTORATIVE PRACTICES, OR EFFECTIVE BEHAVIORAL PRACTICES.

IN THAT SAME PARAGRAPH, THE STATE CALLS OUT LANGUAGE FROM DR. MCCART ABOUT THE LACK OF TOOLS, RESOURCES, OR TRAINING FOR GNETS STAFF TO SUPPORT STUDENTS IN THE GNETS PROGRAM. THUS, THE STATE'S POSITION APPEARS TO BE THAT THE GNETS PROGRAM IS SO DEFICIENT IN ITS PROVISION OF SUPPORTS AND SERVICES THAT ANY CURE WOULD NOT CONSTITUTE AN EXPANSION OF CURRENTLY EXISTING PRACTICES BUT WOULD BE SO SUBSTANTIVE AS TO NECESSITATE THE CREATION OF NEW PROGRAMS.

AND WHILE THE IMPLICATIONS OF THIS POSITION ARE TROUBLING, THE LEGAL ARGUMENT LACKS SUPPORT. THE FACT IS, UNITED STATES IS PERMISSIBLY SEEKING TO REQUIRE THE STATE TO EXPAND ACCESS TO ALREADY-EXISTING SERVICES AND SUPPORTS. AND DR. MCCART SAYS AS MUCH IN HER REPORT. HER RECOMMENDATIONS, AS SHE SAYS ON PAGE 161, ARE, QUOTE, NOT ABOUT THROWING OUT ALL ASPECTS OF GEORGIA'S SYSTEM OR STARTING OVER WITH A BLANK SLATE; RATHER, THE RECOMMENDATIONS FOCUS ON USING EXISTING TOOLS TO DEVELOP A MORE EFFECTIVE SYSTEM OF SUPPORT.

INDEED, LOOKING TO THE VERY DISCUSSIONS HIGHLIGHTED

BY THE STATE IN ITS BRIEF ILLUSTRATE THIS POINT. AS I MENTION, THE STATE SPECIFICALLY CITES DR. MCCART'S LANGUAGE THAT GNETS STAFF, QUOTE, LACK OF UNDERSTANDING OF INTENSIVE INTERVENTIONS ON PAGE 15. BUT WHEN VIEWED IN CONTEXT ON PAGES 147 TO 150 OF HER REPORT, THE INCONSISTENCY OF THE STATE'S POSITION BECOMES CLEAR. ON PAGES 147 TO 149, DR. MCCART DISCUSSES A VARIETY OF SUPPORTS GNETS PURPORTS TO PROVIDE, INCLUDING INTENSIVE INTERVENTION.

SHE OBSERVES THAT, RATHER THAN BEING USED AS A PREVENTATIVE PRACTICE TO SUPPORT STUDENTS IN THE CLASSROOM, INTENSIVE INTERVENTIONS IN THE GNETS PROGRAM INSTEAD REFER TO REACTIVE OR EVEN PUNITIVE MEASURES, INCLUDING USE OF ISOLATION ROOMS.

DR. MCCART ALSO IDENTIFIES A PARTICULAR SITUATION SHE OBSERVED FIRSTHAND WHERE STAFF WERE FAILING TO IMPLEMENT APPROPRIATE INTENSIVE INTERVENTIONS FOR A STUDENT WHO WAS CLEARLY IN NEED OF SUPPORT. SHE HIGHLIGHTED THIS EXAMPLE IN PART TO SHOW OFF -- TO SHOW HOW STAFF FAILED TO USE THE VERY INTENSIVE INTERVENTIONS THEY CLAIMED TO PROVIDE WHEN THAT STUDENT NEEDED IT MOST.

DR. MCCART NOTES OTHER EXAMPLES OF RESOURCES THE GNETS PROGRAM CLAIMS TO UTILIZE, SUCH AS INDIVIDUALIZED EDUCATION PLANS AND BEHAVIOR INTERVENTION PLANS, BUT ALSO NOTES WHETHER OR NOT THEY ARE BEING USED AS THEY SHOULD, SUCH AS WHEN THEY FAILED TO INCLUDE INDIVIDUALIZED CRISIS INTERVENTION

PLANNING OR STAFF WERE NOT KNOWLEDGEABLE ABOUT THEIR CONTENTS OR WHERE THEY WERE IMPLEMENTED INCONSISTENTLY.

IT WOULD NOT TAKE A NEW PROGRAM FOR THE STATE TO REMEDY THESE DEFICIENCIES AND, INDEED, ACCORDING TO THE GNETS RULE, THE STATE PURPORTS TO BE PROVIDING, QUOTE, COMPREHENSIVE EDUCATIONAL AND THERAPEUTIC SUPPORT SERVICES TO STUDENTS NOW.

THE REALITY, HOWEVER, IS THAT THE STATE OFTEN ONLY NOT ONLY IMPLEMENTS SUPPORTS LIKE INTENSIVE INTERVENTIONS, AND IT IS THAT SITUATION DR. MCCART'S REPORT ADDRESSES.

THE STATE ALSO ASSERTS THAT BY FAILING TO USE THE LANGUAGE UNJUSTIFIED ISOLATION, DR. MCCART'S 167-PAGE ANALYSIS IS RENDERED NULL AND VOID. HOWEVER, UNLIKE THE STATE'S EXPERT REBUTTAL WITNESS, DR. MCCART'S REPORT WAS NOT INTENDED TO TOUCH ON LEGAL QUESTIONS. AS A RESULT, IT WOULD NEITHER BE HELPFUL NOR APPROPRIATE FOR DR. MCCART TO PURPORT TO SET FORTH WHAT UNNECESSARY SEGREGATION SHOULD MEAN TO THE COURT.

INSTEAD, HER ANALYSIS CONSISTS OF THE OPINIONS OF A HIGHLY-CREDENTIALED SPECIAL EDUCATION PROFESSIONAL WITH EXTENSIVE EXPERIENCE IN THE SPACE AND AS TO WHETHER THE SEGREGATION OF STUDENTS IN THE GNETS PROGRAM IS NECESSARY. IT'S UP TO THE COURT, IN ITS ROLE AS THE ULTIMATE DECISION-MAKER, TO APPLY THE APPROPRIATE LEGAL STANDARDS TO THAT ANALYSIS.

A CORRECT READING OF THE CASE LAW -- AND THIS, SUPPLIED BY THE STATE, UNDERSCORED THIS POINT AS ONE EXAMPLE --

THE ELEVENTH CIRCUIT IN WINN-DIXIE STORES DID NOT EXCLUDE AN EXPERT BECAUSE THEY DIDN'T USE CATCH PHRASES FROM CASE LAW AS THE STATE SEEKS TO DO HERE. INSTEAD, THE COURT CONCLUDED THAT, BY FAILING TO ACCOUNT FOR CERTAIN EXCEPTIONS IN AN ACTION OVER RESTRICTIVE COVENANTS FOR THE SALE OF GROCERY ITEMS, THE EXPERT IN THAT CASE CONDUCTED AN ANALYSIS THAT WAS MISMATCHED BETWEEN ISSUES BEING LITIGATED AND SHOULD THUS BE EXCLUDED.

AND THE OTHER EXAMPLES THE STATE POINTS TO ALL USE SIMILAR LOGIC, BUT THERE IS NO MISMATCH HERE. DR. MCCART'S ANALYSIS OF WHETHER STUDENTS ARE BEING UNNECESSARILY SEGREGATED FROM THE STANDPOINT OF A SPECIAL EDUCATION PROFESSIONAL HEWS CLOSELY TO LEGAL QUESTIONS BEFORE THIS COURT.

BURIED IN THE FACTS SECTION OF THE STATE'S INITIAL BRIEF, HOWEVER, THE STATE DID AT SEVERAL POINTS ATTEMPT TO MISCONSTRUE DR. MCCART'S DEPOSITION TESTIMONY, ARGUING THAT DR. MCCART IMPERMISSIBLY EQUATED ALL SEGREGATION WITH PER SE UNNECESSARY SEGREGATION FOR PURPOSES OF HER ANALYSIS.

THIS -- THIS CLAIM IS EASILY RESOLVED BY TWO FACTS. NUMBER ONE, DR. MCCART DEFINES SEGREGATION ON PAGE SEVEN OF HER REPORT BUT SEPARATELY AND DISTINCTLY USES THE TERM UNNECESSARY SEGREGATION AT VARIOUS POINTS THROUGHOUT HER REPORT.

TWO, IN THAT SAME DEPOSITION, DR. MCCART REPEATEDLY CLARIFIED THAT NOT ALL SEGREGATION IS UNNECESSARY SEGREGATION. AND THE STATE'S QUESTIONING CLEARLY REFLECTS THAT THEY DO NOT UNDERSTAND DR. MCCART'S TESTIMONY TO BE THAT ALL SEGREGATION IS

UNNECESSARY.

I'LL HIGHLIGHT A FEW EXAMPLES OF THAT. ON PAGE 19 OF HER DEPOSITION, DR. MCCART WAS ASKED IF SHE BELIEVED THERE IS, QUOTE, AN APPROPRIATE ROLE FOR A PROGRAM LIKE GNETS EVER, TO WHICH SHE RESPONDED, QUOTE, NO, NOT FOR GNETS SPECIFICALLY. IF YOU'RE ASKING WHETHER OR NOT IT'S APPROPRIATE TO EVER SEGREGATE STUDENTS, YES.

ON PAGE 68 OF HER DEPOSITION, DR. MCCART STATED SHE WOULD NOT CONSIDER AN IEP TEAM RECOMMENDING A SEGREGATED SETTING BASED ON INDIVIDUAL NEEDS TO BE UNNECESSARY SEGREGATION.

ON PAGE 80, DR. MCCART IS SAYING THAT SHE WOULD NOT CONSIDER FREESTANDING FACILITIES FOR STUDENTS WITH AUTISM SPECTRUM DISORDER OR TRAUMATIC BRAIN INJURY TO BE UNNECESSARY SEGREGATION IN EVERY CASE.

AND ON PAGE 143, DR. MCCART STATED THAT ONE INDICATION OF WHETHER SEGREGATION IS NECESSARY OR NOT IS THE STUDENT'S IEP. ANOTHER WOULD BE WHAT SUPPORTS AND SERVICES ARE PROVIDED. AND, FRANKLY, THOUGH THE STATE KNOWS THAT DR. MCCART DID NOT AND DOES NOT EQUATE ALL SEGREGATION WITH UNNECESSARY SEGREGATION. ON PAGE SEVEN OF THE STATE'S REPLY BRIEF, THE STATE ADMITS AS MUCH WRITING, DR. MCCART, QUOTE, ACKNOWLEDGES SOME STUDENTS NEED TO LEARN IN SEPARATE ENVIRONMENTS. THE STATE MAKES A SIMILAR ACKNOWLEDGMENT ON PAGE SIX OF ITS ORIGINAL BRIEF.

THE STATE'S ARGUMENT HERE STRAINS CREDULITY AND SHOULD BE REJECTED. REGARDLESS, THE FACTUAL BASES OF DR. MCCART'S OPINIONS ARE SPELLED OUT IN PAINSTAKING DETAIL IN HER REPORT, AND, THUS THE COURT CAN USUALLY MAKE ITS OWN DETERMINATIONS AS TO THE APPLICABILITY AND WEIGHT SUCH TESTIMONY SHOULD BE AFFORDED.

THE STATE ALSO REPEATEDLY ASSERTS THAT DR. MCCART DID NOT ENGAGE IN THE TYPE OF INDIVIDUALIZED ANALYSIS REQUIRED FOR THE UNITED STATES TO PROVE ITS CLAIM UNDER OLMSTEAD. THIS ARGUMENT IS RAISED REPEATEDLY IN THE STATE'S MOTIONS. IT HAS BEEN ADDRESSED EARLIER THIS MORNING.

WHILE SUCH INDIVIDUALIZED ANALYSIS IS NOT REQUIRED, THE FACT OF THE MATTER IS THAT DR. MCCART'S ANALYSIS DOES TOUCH ON INDIVIDUAL STUDENTS. AGAIN, DR. MCCART PERSONALLY OBSERVED ALMOST A THOUSAND STUDENTS IN THEIR CLASSROOMS IN THE GNETS PROGRAM, SPENDING BETWEEN TEN AND 90 MINUTES IN THOSE CLASSROOMS, WHERE SHE OBSERVED THINGS LIKE STUDENTS' LEVEL OF ENGAGEMENT, PROBLEM BEHAVIORS, COMMUNICATION STYLES, INTERACTIONS WITH TEACHERS AND RESPONSES TO THOSE INTERACTIONS.

DR. MCCART ALSO REVIEWED HUNDREDS OF STUDENT FILES. AND HER REPORT IS REPLETE WITH STUDENT-SPECIFIC EXAMPLES WHEN APPROPRIATE.

AND I WANT TO NOTE FOR THE COURT, TOO, THAT THE 65 TO 100 IEP ESTIMATE THAT'S REFERENCED IN THE BRIEFING WAS AN EXPLICITLY CONSERVATIVE ESTIMATE, GIVEN ONLY WHEN PRESSED TO

GIVE A SPECIFIC FIGURE IN THE DEPOSITION. DR. MCCART REPEATEDLY TOLD THE STATE SHE REVIEWED ALL DOCUMENTS IDENTIFIED IN HER CONSIDERED MATERIALS, AND CROSS-REFERENCE TO THESE MATERIALS WOULD SHOW THAT SHE REVIEWED OVER 500 INDIVIDUAL STUDENT'S FILES.

THE STATE'S CHARACTERIZATION OF DR. MCCART'S ANALYSIS AS GENERALIZED IS JUST NOT BORNE OUT BY REALITY. SIMILARLY, THE STATE'S CITATION TO BIRCOLL IS MISPLACED. IT DOES NOT SAY THAT THE UNITED STATES CANNOT ADDRESS SYSTEMIC VIOLATIONS OF TITLE II AS IT SEEKS TO DO HERE.

WHILE IT DOES SAY THAT REASONABLENESS IS DETERMINED ON A CASE-BY-CASE BASIS, THIS IS BOTH UNCONTESTED AND UNCONTROVERSIAL. REASONABLENESS SHOULD BE DETERMINED UNDER THE FACTS OF EACH CASE, INCLUDING THIS ONE. BUT THAT DOES NOT MEAN, HOWEVER, AND IT WAS NOT BEFORE THE COURT IN THAT CASE, THAT EVERY INDIVIDUAL VICTIM OF SYSTEMIC TITLE II VIOLATIONS MUST BE EVALUATED FOR INDIVIDUALIZED REMEDIES TO PROVE A CLAIM. AND THE STATE CITES NO APPLICABLE AUTHORITY TO SUGGEST OTHERWISE.

NEXT, THE STATE CLAIMS THAT, IN ADDITION TO BEING EXPERT IN SPECIAL EDUCATION, DR. MCCART WAS OBLIGATED TO ALSO SERVE AS AN EXPERT IN BUDGETING AND WORKFORCE FOR HER REPORT TO BE RELEVANT. AGAIN, MUCH OF THIS WAS DISCUSSED EARLIER THIS MORNING. BUT WHILE DR. MCCART CAN SPEAK TO BOTH OF THESE ISSUES, GIVEN HER EXTENSIVE EXPERIENCE IN THE FIELD, THE

STATE'S ARGUMENT IS UNREASONABLE.

OLMSTEAD DOES NOT, AND AS THE STATE ASSERTS, REQUIRE TITLE II PLAINTIFFS TO AFFIRMATIVELY ADDRESS COSTS OR WORKFORCE FOR ITS REMEDIES TO BE DEEMED REASONABLE MODIFICATIONS. AS THE SECOND CIRCUIT HELD IN HENRIETTA D., IN SHOWING REASONABLE MODIFICATIONS, THE BURDEN ON THE PLAINTIFF IS NOT A HEAVY ONE. THIS IS CONSISTENT WITH THE TENTH AND THIRD CIRCUITS' RULINGS IN FISHER AND FREDERICK L. THAT ACKNOWLEDGE THAT COST IS NOT DISPOSITIVE, AND SIMILARLY COURTS HAVE RULED THAT REASONABLE MODIFICATIONS MAY INCLUDE THE EXPANSION OF SERVICES AND RESOURCE ALLOCATION. INSTEAD, THE BURDEN IS ON THE STATE, TO THE EXTENT IT WANTS TO PLEAD AND PROVE A DEFENSE OF FUNDAMENTAL ALTERATION.

NEXT, THE STATE CLAIMS THAT DR. MCCART'S REPORT SHOULD BE EXCLUDED UNDER FRAZIER DUE TO HER ALLEGED FAILURE TO EXPLAIN IN HER REPORT HOW HER EXPERIENCE RELATES TO HER FINDINGS IN THIS CASE. AND WHILE DR. MCCART CERTAINLY HAS VAST EXPERIENCE WORKING WITH DOZENS OF STATES ACROSS THE COUNTRY, YET IS A CELEBRATED ACADEMIC IN THE FIELD OF SPECIAL EDUCATION, THE STATE'S ARGUMENT LACKS MERIT.

THE STATE'S CITATION TO FRAZIER AND HAMMAD IS INAPPOSITE. THOSE CASES STAND FOR THE PROPOSITION THAT, WHEN AN EXPERT IS RELYING, QUOTE, SOLELY OR PRIMARILY ON EXPERIENCE, THEN THEY MUST, QUOTE, EXPLAIN HOW THAT EXPERIENCE LEADS TO THE CONCLUSIONS REACHED. AND THAT'S -- THOSE CASES CITE IN THE

COMMITTEE NOTE TO RULE 702. WHILE DR. MCCART'S EXTENSIVE EXPERIENCE CERTAINLY ASSISTED HER IN THE PROCESS OF GATHERING AND ANALYZING VAST AMOUNTS OF INFORMATION THAT'S CONTAINED IN HER REPORT, SHE IS NEITHER SOLELY NOR PRIMARILY RELYING ON HER EXPERIENCE TO FORM HER OPINIONS. HER EDUCATION AND CREDENTIALS AS AN ACADEMIC IN THE FIELD OF SPECIAL EDUCATION AS WELL AS HER COMPREHENSIVE REVIEW IN THIS CASE ALL FORM A COEQUAL BASIS WITH HER EXPERIENCE FOR HER OPINIONS.

DR. MCCART, EXPLAINING TO HER METICULOUS METHODOLOGY SUFFICIENTLY IN HER REPORT, BUT SHE'LL ALSO HAVE THE OPPORTUNITY TO EXPLAIN AT TRIAL WAYS IN WHICH HER EXPERIENCE WORKING WITH EDUCATION AUTHORITIES ACROSS THE COUNTRY HELPED TO INFORM HER ANALYSIS IN THIS CASE.

THE STATE ALSO ARGUED THAT, BY FAILING TO IDENTIFY A STATE THAT HAS FULLY IMPLEMENTED MULTI-TIERED SYSTEMS OF SUPPORTS, OR MTSS, DR. MCCART'S TESTIMONY IS SOMEHOW INVALIDATED AND AT THE ONSET, I WANT TO ACKNOWLEDGE, TOO, MTSS, WHICH INCLUDES PBIS, POSITIVE BEHAVIOR INTERVENTION AND SUPPORTS, WHICH IS THE BEHAVIORAL COMPONENT OF MTSS, BUT MTSS IS NOT A PROGRAM. IT IS A FRAMEWORK FOR PROVIDING SUPPORTS AND SERVICES FOR STUDENTS, WITH THE LOWEST LEVEL OF SUPPORTS AND SERVICES BEING TIER ONE, WHICH IS AVAILABLE FOR ALL STUDENTS, AND THE HIGHEST LEVEL BEING TIER THREE.

NOTABLY, THE STATE HAS ENDORSED MTSS AND CONTINUES TO ENCOURAGE DISTRICTS TO ADOPT IT. OF COURSE, THAT

IMPLEMENTATION OF RECOMMENDATIONS IN GEORGIA AND, INDEED, ANY STATE WILL DIFFER FROM OTHER STATES DOES NOTHING TO CHANGE THE ANALYSIS THAT WILL ULTIMATELY BE BEFORE THE COURT. ALL STATES, JUST LIKE ALL CASES, ARE DIFFERENT.

BUT DR. MCCART'S EXTENSIVE EXPERIENCE WORKING WITH A WIDE VARIETY OF STATES TO SERVE STUDENTS WITH DISABILITIES MAKES HER UNIQUELY POSITIONED TO SPEAK TO THE REASONABLE MODIFICATIONS THAT GEORGIA CAN MAKE. IN ADDITION, DR. MCCART'S RECOMMENDATIONS, INCLUDING THOSE RELATED TO IMPLEMENTATION OF MTSS, ARE WELL ROOTED IN HER THOROUGH EVALUATION OF THE GNETS PROGRAM.

WHILLE THE EVALUATION OF STATEWIDE MTSS IMPLEMENTATION WAS BEYOND THE SCOPE OF HER REVIEW, THIS IS NOTHING TO DETRACT FROM HER FINDINGS OR RECOMMENDATIONS BASED ON THE STATE'S DEFICIENT PRACTICES LEADING TO UNNECESSARY SEGREGATION AND UNEQUAL EDUCATIONAL OPPORTUNITIES FOR STUDENTS IN THE GNETS PROGRAM. IF ANYTHING, AGAIN, THE STATE'S ARGUMENTS GO TO WEIGHT RATHER THAN ADMISSIBILITY.

THE STATE ALSO ASSERTS THAT DR. MCCART'S TESTIMONY IS UNHELPFUL BECAUSE OF HER LACK OF KNOWLEDGE OF FUNDING, HIRING, AND SIMILAR TOPICS. AND THIS ARGUMENT, TOO, IS UNAVAILING. DR. MCCART'S TESTIMONY IS HELPFUL BECAUSE, ONE, IT IS BASED ON THOROUGH REVIEW THAT, AGAIN, CONSISTED OF 70 SITE VISITS, PERSONAL OBSERVATIONS OF NEARLY 1,000 STUDENTS, REVIEW OF HUNDREDS OF STUDENT FILES, REVIEW OR ATTENDANCE AT A DOZEN

DEPOSITIONS, AND REVIEW OF NUMEROUS OTHER DOCUMENTS IDENTIFIED IN HER CONSIDERED MATERIALS.

TWO, IT'S ON A SPECIALIZED SUBJECT, NAMELY, SPECIAL EDUCATION FOR STUDENTS WITH BEHAVIOR-RELATED DISABILITIES, WHICH INCLUDES NOT ONLY EDUCATION, BUT BEHAVIOR ANALYSIS AND MANAGEMENT.

AND, THREE, HER EDUCATION AND -- OR EXPERIENCE AND CREDENTIALS WILL HELP THE COURT CONTEXTUALIZE VAST AMOUNTS OF INFORMATION ABOUT THE GNETS PROGRAM. ULTIMATELY, THE ISSUES THE STATE POINTS TO ARE OUTSIDE THE SCOPE OF DR. MCCART'S REVIEW.

FOR EXAMPLE, THE STATE OF -- THE ISSUE OF STATE ADMINISTRATION HAS BEEN BRIEFED MULTIPLE TIMES BEFORE THIS COURT AND ARGUED AGAIN TODAY. NONETHELESS, TO THE EXTENT THE STATE WANTS TO ARGUE THAT DR. MCCART'S PURPORTED FAILURE TO EVALUATE THE GNETS FUNDING STRUCTURE UNDERMINES HER OPINIONS ABOUT UNNECESSARY SEGREGATION OR UNEQUAL EDUCATIONAL OPPORTUNITIES, THEY ARE FREE TO DO SO. SUCH ARGUMENTS GO TO WEIGHT, ONCE AGAIN, RATHER THAN ADMISSIBILITY.

FINALLY, THE STATE'S ATTACKS ON DR. MCCART'S METHODOLOGY IGNORE THE STANDARDS APPLICABLE TO SOCIAL SCIENCE EXPERTS LIKE DR. MCCART. AS SET FORTH IN OUR BRIEF, THE STANDARDS FOR EXPERTS UNDER DAUBERT ARE FLEXIBLE, PARTICULARLY IN A BENCH TRIAL AND PARTICULARLY WHERE, AS HERE, THE STATE SEEKS TO EXCLUDE TESTIMONY AT THE SUMMARY JUDGMENT STAGE.

SOCIAL SCIENCES IN PARTICULAR ARE ONLY REQUIRED TO HAVE FOLLOWED THE STANDARDS APPLICABLE TO THEIR FIELD TO BE RELIABLE. AND THE TYPE OF REVIEW THAT DR. MCCART CONDUCTED CAN'T BE CONDUCTED IN A CONTROLLED ENVIRONMENT. SO AS SET FORTH IN SIMMONS, THE COURT SHOULD INSTEAD LOOK TO HER EXPERIENCE, EDUCATION, TRAINING, AND OBSERVATIONS.

AND AS THIS DISTRICT HAS RECOGNIZED, FOR SOCIAL SCIENCES, THIS TYPE OF OBSERVATION AND ANALYSIS IS BOTH GENERALLY ACCEPTED AND SOUND UNDER DAUBERT. AND THAT'S THE FAIR FIGHT ACTION CASE.

IN THIS CASE, DR. MCCART'S TESTIMONY IS BASED ON HER EXPERIENCE, TRAINING, EDUCATION, AND OBSERVATIONS AFTER SIGNIFICANT TIME SPENT IN GNETS SETTINGS. THAT IS SUFFICIENT.

THE STATE'S ATTEMPTS TO ARGUE AGAINST ESTABLISHED CASE LAW, INCLUDING IN THIS DISTRICT, SHOULD BE REJECTED.

IN SUM, THOUGH THE STATE ATTEMPTS TO ALLOW THE NUMBER OF VARYING ATTACKS AGAINST DR. MCCART'S TESTIMONY, HER EXPERT OPINIONS ARE WELL FOUNDED BY BOTH HER COMPREHENSIVE REVIEW AND THE STANDARDS FOR ADMISSION OF SUCH TESTIMONY UNDER LAW. FOR THAT REASON, THE UNITED STATES ASKS THIS COURT TO DENY THE STATE'S MOTION IN ITS ENTIRETY.

THANK YOU.

THE COURT: THANK YOU.

ACTUALLY, BEFORE YOU START, MR. BELINFANTE --

MR. BELINFANTE: YES, YOUR HONOR.

THE COURT: LET ME ASK YOU ONE THING, MR. GILLESPIE. I JUST WANT, SINCE WE HAVE HEARD A LOT ABOUT THE BUDGET, THE COST FOR CHANGES AND ADEQUATE STAFFING AND ALL, AND NOW THAT WE -- IT'S UNDERSTOOD THAT DR. MCCART WOULD NOT BE OFFERING THAT TESTIMONY, AND YOUR POSITION IS SHE DOESN'T NEED TO, DOES PLAINTIFF HAVE SOMEONE ELSE WHO WILL DISCUSS THAT TYPE OF EVIDENCE? OR DOES PLAINTIFF TAKE SOME OTHER POSITION REGARDING WHETHER YOU ALL EVEN NEED TO GO THAT FAR?

MR. GILLESPIE: YOUR HONOR, SO I'LL SAY ON THE ONSET, IT'S OUR POSITION THAT WE DON'T NEED TO TOUCH ON COST OR WORKFORCE AS A PART OF OUR AFFIRMATIVE CASE.

THE COURT: OKAY.

MR. GILLESPIE: WE NEED TO SHOW OUR REASONABLE MODIFICATIONS. AND BOTH OF OUR EXPERTS ARE GOING TO BE ABLE TO DISCUSS THAT.

BUT AS THE CASES THAT WE CITE TO INDICATE, COST ISN'T DISPOSITIVE. AND THAT'S SOMETHING THAT IF THE STATE WANTED TO RAISE, IT SHOULD BE THROUGH THE FUNDAMENTAL ALTERATION DEFENSE.

THE COURT: ALL RIGHT. THANK YOU.

MR. GILLESPIE: THANK YOU, YOUR HONOR.

MR. BELINFANTE: ALL RIGHT. I'LL START WHERE YOU JUST LEFT OFF.

IF DR. MCCART IS GOING TO TESTIFY THAT HER RECOMMENDATIONS ARE REASONABLE, SHE NEEDS TO DETERMINE WHAT REASONABLE IS. AND SHE SAYS COST AND WORKFORCE MATTER.

AND SO WHAT WE'VE HEARD FROM THE DEPARTMENT JUST NOW, WE DISAGREE WITH A LOT OF THE FACTS THAT WERE SAID, AND I'M NOT GOING TO GET INTO THAT. BUT A LOT OF WHAT WE ALSO HEARD WAS NEW AND NOT IN THE BRIEFS.

BUT HERE'S THE KEY. WHEN THE UNITED STATES TRIES TO ARGUE ITSELF AROUND, SHE APPLIED THE WRONG TEST, IT ONLY HIGHLIGHTS THE PROBLEM WITH DR. MCCART'S COMPLETELY ABSENT METHODOLOGY. IN OTHER WORDS, IF YOU LOOK AT WHAT WAS SAID, IT IS, WELL, DR. MCCART'S HIGHLY QUALIFIED.

AGAIN, FRAZIER SPEAKS TO THIS. IF ADMISSIBILITY COULD BE MERELY ESTABLISHED BY THE IPSE DIXIT OF AN ADMITTEDLY QUALIFIED EXPERT, THE RELIABILITY PRONG WOULD BE, FOR ALL PRACTICAL PURPOSES, SUBSUMED.

AND THE COURT ASKED, HOW DO YOU MEASURE WHETHER SOMEONE IS RELIABLE IN THIS CONTEXT. THAT'S WHERE THE AEGIS AND THE DOLGENCORP CASES COME IN AND THEY SAY, IS THIS PERSON APPLYING THE CORRECT TEST.

THE PROBLEM WITH DR. MCCART IS, THE MORE THEY TRY TO ARTICULATE THAT SHE'S APPLYING THE RIGHT TEST, IT ONLY BEGS THE QUESTION ON THE METHODOLOGY. SAYS THAT SHE DIDN'T CONSIDER IEP TEAMS' RECOMMENDATIONS UNNECESSARY.

BUT HOW DID SHE EVALUATE THE IEP TEAMS. DR. MCCART DOESN'T SAY. HER REPORT DOESN'T SAY. THERE'S JUST NO EXPLANATION OF IT.

ON THE INDIVIDUALIZED ANALYSIS, THEY SAY, WELL, SHE

PERSONALLY OBSERVED ALL THESE PEOPLE AND SHE WALKED INTO THE CLASSROOMS. WHAT METHODOLOGY DID SHE APPLY? IN THE DEPOSITION WE ASKED THIS SPECIFICALLY. I SAID, CAN YOU DETERMINE SOMEONE WITHIN TEN MINUTES OF WHAT WOULD BE APPROPRIATE FOR THAT CHILD?

ABSOLUTELY.

WHAT'S THE METHODOLOGY APPLIED THERE?

OH, IT'S IN THE LITERATURE. IT'S THE CLASSIC, TRUST ME, I'M AN EXPERT, WHICH THIS COURT HAS REJECTED.

THEY DIDN'T SAY DR. MCCART'S EXPERIENCE IS NOT THE SOLE BASIS. BUT I DON'T KNOW THAT THE UNITED STATES WANTS TO ARGUE THAT, BECAUSE THEN THEY GET MORE INTO THE DAUBERT CATEGORIES, WHICH THEY HAVE NOT -- PLAINLY NOT SATISFIED.

AND WHEN THEY LOOK TO THE REASONABLE ACCOMMODATIONS AND THE RELEVANCE OF DR. MCCART'S TESTIMONY ON THAT, IT WAS NICE TO HEAR ABOUT THE SECOND CIRCUIT, THE TENTH CIRCUIT AND THE FOURTH, BUT YOU HAVE STILL NOT HEARD ABOUT BIRCOLL IN THE ELEVENTH CIRCUIT, OR THE OTHER CASE IN THE ELEVENTH CIRCUIT, THAT IT IS PART OF THEIR PRIMA FACIE CASE. AND IF THEY ARE NOT GOING TO PUT UP DR. MCCART OR DR. PUTNAM, THE ONLY WITNESSES THAT THEY'VE OFFERED TO OFFER ANY KIND OF REASONABLE ACCOMMODATION, AND THEY CAN'T TESTIFY TO THE REASONABLENESS OF IT, THEN, YOUR HONOR, THE CASE SHOULD BE DISMISSED ON THAT PRONG ALONE.

THAT'S ALL I'VE GOT, YOUR HONOR.

THE COURT: OKAY.

MR. BELINFANTE: THANK YOU.

I DIDN'T KNOW IF YOU WERE THINKING OF A QUESTION.

THE COURT: NO, I WAS NOT.

MR. BELINFANTE: ALL RIGHT. THANK YOU, YOUR HONOR.

THE COURT: GOT ONE OF THOSE PENSIVE FACES, I GUESS.

ALL RIGHT. WHERE ARE WE NEXT?

MS. HERNANDEZ: YOUR HONOR, WE'RE GOING TO BE ARGUING -- WELL, I WILL BE ARGUING DEFENDANT'S MOTION TO EXCLUDE PLAINTIFF'S EXPERT ROBERT PUTNAM.

THE COURT: GOT IT. ALL RIGHT. THANK YOU.

AND REMIND ME OF YOUR NAME, COUNSELOR, I'M SORRY.

MS. HERNANDEZ: DANIELLE HERNANDEZ.

THE COURT: GOT IT. ALL RIGHT. THANK YOU.

MS. HERNANDEZ: IS THERE ANY WAY WE CAN GET THIS SWITCHED ON?

THANK YOU SO MUCH.

GOOD AFTERNOON, YOUR HONOR. MAY IT PLEASE THE COURT.

THE COURT: YES, MA'AM.

MS. HERNANDEZ: DANIELLE HERNANDEZ ON BEHALF OF THE STATE OF GEORGIA.

YOUR HONOR, I WILL BE DISCUSSING WHY DR. PUTNAM'S EXPERT REPORT AND RELATED TESTIMONY SHOULD BE EXCLUDED.

DR. PUTNAM ADMITS, AS YOU CAN SEE ON MY FIRST LEG, THAT I DON'T KNOW A LOT ABOUT GNETS BECAUSE THAT'S NOT WHAT I WAS ASKED TO CONSIDER.

YOUR HONOR, THIS QUOTE IS IMPORTANT BECAUSE IT SHEDS LIGHT ON WHY DR. PUTNAM'S REPORT IS UNRELIABLE AND IRRELEVANT TO THE CASE AT HAND. I WILL DIVE INTO THAT MORE SHORTLY.

AS MY COLLEAGUE MR. BELINFANTE DISCUSSED, THERE IS A THREE-PART INQUIRY TO DETERMINE THE ADMISSIBILITY OF A PROFFERED EXPERT. RELEVANT TO THE STATE'S MOTION TO EXCLUDE DR. PUTNAM ARE THE RELIABILITY AND RELEVANCE PRONGS.

DR. PUTNAM'S TESTIMONY IS TOO UNRELIABLE. DR. PUTNAM'S REPORT AND TESTIMONY IS TOO UNRELIABLE TO BE CONSIDERED IN THIS CASE FOR THREE REASONS. THE FIRST REASON, DR. PUTNAM EMPLOYED LITTLE TO NO METHODOLOGY IN REACHING HIS CONCLUSIONS.

SECOND, YOUR HONOR, THE DEFINITIONS THAT DR. PUTNAM RELIES ON TO REACH HIS CONCLUSIONS AND RECOMMENDATIONS ARE ONES THAT ARE NOT GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY. THEY ARE DEFINITIONS THAT PUTNAM HIMSELF CREATED.

AND, THIRD, YOUR HONOR, DR. PUTNAM ACKNOWLEDGES NOT KNOWING ABOUT CRITICAL ASPECTS OF GEORGIA STATE GOVERNMENT AND GEORGIA'S EDUCATIONAL SYSTEM, DESPITE MAKING NUMEROUS AND SIGNIFICANT POLICY RECOMMENDATIONS CONCERNING THESE FUNDAMENTAL MISUNDERSTANDINGS.

SO, FIRST, YOUR HONOR, DR. PUTNAM'S METHODOLOGY IS UNRELIABLE. YOUR HONOR, AS YOU CAN SEE UP HERE ON THE POWERPOINT, THIS IS A SCREENSHOT OF PAGE FOUR OF DR. PUTNAM'S REPORT AND METHODOLOGY SECTION. SO WHILE DR. PUTNAM LABELS

THIS SECTION METHODOLOGY, NOWHERE IN THIS SECTION OR IN THE REST OF HIS REPORT DOES HE LAY OUT THE METHODOLOGY HE EMPLOYS. HE SIMPLY SAYS AND LISTS OUT BROADLY WHAT INFORMATION HE CONSIDERED AND HE EXPLAINS THAT HE RELIED ON, QUOTE, HIS EXPERTISE IN THE FIELD TO REACH HIS CONCLUSIONS AND RECOMMENDATIONS.

DR. PUTNAM STATES HE REVIEWED DOCUMENTS, HE OBSERVED DEPOSITIONS, HE CONDUCTED SITE VISITS, HE CONSIDERED SCHOLARLY RESEARCH, AND, QUOTE, HE USED HIS DECADES OF EXPERIENCE.

LIKE IN SCHEINFELD, YOUR HONOR, WHERE THE EXPERT ONLY STATED THAT HE UTILIZED THE SCIENTIFIC METHOD TO REACH HIS CONCLUSION, DR. PUTNAM MERELY LISTING OUT WHAT HE CONSIDERED AND REVIEWED AND STATING THAT HE USED HIS YEARS OF EXPERIENCE IN THE FIELD, THAT DOES NOT DEMONSTRATE THAT HE EMPLOYED A SPECIFIC METHODOLOGY, NOR DOES IT INFORM THE STATE OR THE COURT ON HOW HIS EXPERIENCE LED HIM TO REACH HIS CONCLUSIONS IN THIS CASE. LIKE THE EXPERT IN SCHEINFELD, DR. PUTNAM'S REPORT IS, QUOTE, VOID OF FACT EXPLANATION.

YOUR HONOR, DR. PUTNAM FAILED TO CONSIDER MANY THINGS WHEN HE WAS WRITING HIS REPORT AND CONDUCTING HIS ANALYSIS. FIRST, HE DID NOT REVIEW ANY STUDENT FDA'S. HE ONLY REVIEWED SEVEN OUT OF APPROXIMATELY 3,000 GNETS STUDENT FILES. HE LIMITED HIS ANALYSIS TO ONLY STUDENTS WHO WERE MEDICAID BENEFICIARIES. AND HE DOES NOT STATE HOW HIS EXPERIENCE IN THE FIELD HAS LED HIM TO REACH HIS CONCLUSIONS, WHY HIS EXPERIENCE

IN THE FIELD IS A SUFFICIENT BASIS FOR HIS CONCLUSIONS AND RECOMMENDATIONS, OR HOW HE RELIABLY APPLIED HIS EXPERIENCE TO THE FACTS IN THIS CASE.

YOUR HONOR, THE SECOND REASON WHY DR. PUTNAM'S METHODOLOGY IS TOO UNRELIABLE TO BE CONSIDERED IS BECAUSE HE RELIES ON HIS OWN DEFINITIONS TO COME TO HIS CONCLUSIONS. HE DOES NOT RELY ON ONES THAT ARE GENERALLY ACCEPTED IN THE COMMUNITY. AS YOU CAN SEE FROM MY POWERPOINT, YOUR HONOR, DR. PUTNAM MAKES HIS OWN DEFINITIONS OF APPROPRIATE SERVICES AND SERVED EFFECTIVELY. THESE DEFINITIONS ARE CONTRARY TO THE ONES OUTLINED BY THE ADA AND OLMSTEAD.

SPECIFICALLY, DR. PUTNAM'S MAIN ASSERTION IN THIS CASE IS THAT, QUOTE, THE VAST MAJORITY OF STUDENTS WITH BEHAVIOR-RELATED DISABILITIES, INCLUDING THOSE STUDENTS AT SERIOUS RISK OF RESTRICTIVE EDUCATIONAL PLACEMENT, CAN BE SERVED EFFECTIVELY IN GENERAL EDUCATION SCHOOLS WITHIN THEIR COMMUNITIES IF PROVIDED WITH THE APPROPRIATE SERVICES.

WHY ARE THESE -- THESE TERMS APPROPRIATE SERVICES AND SERVED EFFECTIVELY IMPORTANT. WELL, YOUR HONOR, AS MY COLLEAGUE PREVIOUSLY STATED, IT IS WELL ESTABLISHED THAT WHAT CONSTITUTES APPROPRIATE SERVICES IN AN ADA CLAIM REQUIRES AN INDIVIDUALIZED INQUIRY BASED ON THE INDIVIDUAL UNIQUE NEEDS OF EACH STUDENT. THIS DOES NOT PERMIT A GENERALIZED APPROACH LIKE THE ONE USED BY DR. PUTNAM. AGAIN, DR. PUTNAM ONLY REVIEWED SEVEN STUDENT FILES OUT OF 3,000 STUDENT FILES TO COME TO HIS

CONCLUSIONS IN THIS CASE.

THIRD, YOUR HONOR, DR. PUTNAM'S TESTIMONY AND REPORT ARE TOO UNRELIABLE BECAUSE HE ACKNOWLEDGES NOT KNOWING ABOUT CRITICAL ASPECTS OF GEORGIA STATE GOVERNMENT AND EDUCATION SYSTEM, BUT HE STILL MAKES NUMEROUS AND SIGNIFICANT POLICY RECOMMENDATIONS BASED ON THESE MISUNDERSTANDINGS.

A FEW EXAMPLES OF WHAT DR. PUTNAM MISUNDERSTANDS ARE HERE ON THE SCREEN. FIRST, YOUR HONOR, HE MISUNDERSTANDS HOW THE GNETS PROGRAM IS FUNDED OR WHETHER STATE AGENCIES CAN MANDATE THAT GEORGIA SCHOOL DISTRICT ADOPT A PBIS PROGRAM.

YOUR HONOR, NOW I'M GOING TO DISCUSS WHAT -- THE SECOND PRONG, THE RELEVANCY PRONG. DR. PUTNAM'S TESTIMONY IS NOT RELEVANT TO THIS CASE FOR THREE REASONS.

FIRST, YOUR HONOR, THE STANDARD-OF-CARE TESTIMONY BY DR. PUTNAM IS NOT APPLICABLE TO AN ADA CLAIM.

SECOND, ANALYSIS ON APPROPRIATENESS BY DR. PUTNAM OF THE SERVICES THESE STUDENTS ARE RECEIVING IS NOT RELEVANT BECAUSE HE DID NOT CONDUCT AN INDIVIDUALIZED ANALYSIS FOR WHAT IS INHERENTLY INDIVIDUALIZED DETERMINATION.

AND, THIRD, YOUR HONOR, DR. PUTNAM'S TESTIMONY DOES NOT ACCOUNT FOR THE PRESENT REALITIES IN GEORGIA.

THE COURT: ALL RIGHT. SO LET ME JUST STOP YOU THERE. FOR APPROPRIATENESS OF SERVICES, BECAUSE YOU'VE ALREADY DISCUSSED THAT IN THESE DEFINITIONS HE SUPPOSEDLY MADE UP, I'M TRYING TO UNDERSTAND YOUR POINT THERE.

ARE YOU SAYING HE MADE THAT POINT -- HE MADE THAT DEFINITION UP, OR HE JUST DID NOT CARRY IT OUT OR APPLY IT CORRECTLY BECAUSE HE DID NOT DO IT ON AN INDIVIDUALIZED BASIS, AS OPPOSED TO DOING IT ON A GENERAL BASIS? I MISSED SOMETHING WITH MAKING UP DEFINITIONS THERE, BECAUSE FROM WHAT YOU DESCRIBED, IT SEEMED TO COMPORT WITH THE REQUIRED DEFINITION.

MS. HERNANDEZ: SO, YOUR HONOR, WHAT I'M TRYING TO SAY HERE IS THAT THE -- WHAT DR. PUTNAM DEEMS AN APPROPRIATE SERVICE IS IRRELEVANT, BECAUSE THE ADA DOES NOT REQUIRE A STATE TO PROVIDE A CERTAIN LEVEL OR A CERTAIN AMOUNT OF A SERVICE.

THE COURT: AND I UNDERSTAND NOW YOU'RE TALKING ABOUT RELEVANCY.

MS. HERNANDEZ: YES, MA'AM.

THE COURT: BUT ON THE PREVIOUS SCREEN, YOU WERE SAYING HE JUST KIND OF -- IT SOUNDED LIKE YOU WERE SAYING HE JUST PULLED THIS DEFINITION OUT OF THE AIR, NOT SO MUCH RELEVANCY, BUT THAT IT'S AN INCORRECT TERM OR BEING USED INCORRECTLY. AND I THINK I MISSED SOMETHING THERE.

MS. HERNANDEZ: YES, YOUR HONOR. I WAS SAYING THAT THE FACT THAT HE DID A GENERALIZED ANALYSIS, FOR EXAMPLE, DEALING WITH THAT SEVEN OUT OF 3,000 STUDENTS, BECAUSE WHAT IS DETERMINED -- WHAT AN APPROPRIATE SERVICE IS DEFINED BY THE INDIVIDUAL NEEDS OF THE STUDENT, SO BECAUSE HE CONDUCTED THIS VERY GENERALIZED APPROACH, HIS METHODOLOGY IS FLAWED IN THAT SENSE AND SHOULD NOT BE ADMISSIBLE.

THE COURT: OKAY. OKAY.

MS. HERNANDEZ: NOW, YOUR HONOR, I'M GOING TO TALK ABOUT THE STANDARD OF CARE AND WHY DR. PUTNAM'S DEFINITION OF THE STANDARD OF CARE HERE IS NOT ADMISSIBLE AND NOT RELEVANT.

AS YOU CAN SEE HERE, DR. PUTNAM DEFINES THE STANDARD OF CARE AS BEING COMPRISED OF THESE FIVE KEY SERVICES AND THESE TWO SERVICE DELIVERY METHODS. HOWEVER, WHAT DR. PUTNAM DESCRIBES AS THE STANDARD OF CARE IS IRRELEVANT BECAUSE, AS PREVIOUSLY STATED, TITLE II OF THE ADA DOES NOT IMPOSE ON STATES THE STANDARD OF CARE FOR WHATEVER MEDICAL SERVICES THEY RENDER.

IT ALSO MAKES CLEAR THAT IT DOES NOT REQUIRE STATES TO PROVIDE A CERTAIN LEVEL OF BENEFITS TO STUDENTS WITH DISABILITIES.

SECOND, YOUR HONOR, DR. PUTNAM'S TESTIMONY ON WHAT APPROPRIATE SERVICE IS IS IRRELEVANT. I JUST WANT TO LAY THAT WITH YOUR HONOR AND SO I'LL GO AHEAD SINCE I'M RUNNING OUT OF TIME.

THE COURT: YOU'RE OKAY.

MS. HERNANDEZ: LASTLY, YOUR HONOR, DR. PUTNAM'S TESTIMONY IS NOT RELEVANT BECAUSE IT DOES NOT ACCOUNT FOR THE PRESENT REALITIES IN GEORGIA AND, THEREFORE, IT CAN'T SHOW THAT HIS RECOMMENDATIONS ARE REASONABLE.

SPECIFICALLY, DR. PUTNAM DID NOT CONDUCT A WORK OR COST STUDY ANALYSIS TO DETERMINE WHETHER HIS PROPOSED

RECOMMENDATIONS ARE IN FACT REASONABLE. DR. PUTNAM'S FAILURE TO CONSIDER COST AND WORKFORCE ANALYSIS PREVENTS THE STATE AND THIS COURT FROM DETERMINING WHETHER DR. PUTNAM'S RECOMMENDATIONS --

THE COURT: SLOW DOWN. I'M NOT GOING TO STEAL FROM YOU THE TIME IT TOOK ME TO ASK THOSE QUESTIONS. SLOW DOWN. YOU'LL BE FINE. OKAY? OR MADAM COURT REPORTER WILL BE MAD AT BOTH OF US. SLOW DOWN.

MS. HERNANDEZ: THANK YOU, YOUR HONOR.

WHETHER DR. PUTNAM'S RECOMMENDATIONS ARE IN FACT REASONABLE PER OLMSTEAD AND THEREFORE RELEVANT.

FOR THESE REASONS, YOUR HONOR, WE ASK THAT DR. PUTNAM'S REPORT AND TESTIMONY BE EXCLUDED.

THE COURT: THANK YOU.

MS. HERNANDEZ: I RESERVE THE REMAINDER OF MY TIME FOR REBUTTAL.

THE COURT: WE'LL MARK IT UP TO AT LEAST 60 SECONDS. NO, YOU'LL BE FINE. YOU'LL BE FINE.

YES, MA'AM.

MS. COHEN: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

MS. COHEN: FRAN COHEN FOR THE UNITED STATES.

THE COURT: YES, MA'AM.

MS. COHEN: WELL, WE'VE HEARD A LOT ABOUT WHAT THE STATE THINKS DR. PUTNAM DID OR DIDN'T DO. I'M GOING TO REVIEW

WHAT HE ACTUALLY DID DO.

THE COURT: OKAY.

MS. COHEN: HE WILL TESTIFY THAT GEORGIA FAILS TO PROVIDE INTEGRATED SERVICES IN SUFFICIENT QUANTITY OR INTENSITY TO SUPPORT STUDENTS WITH BEHAVIOR-RELATED DISABILITIES IN GENERAL EDUCATION SETTINGS.

HE WILL ALSO TESTIFY THAT THE -- THIS FAILURE RESULTS IN STUDENTS UNNECESSARILY BEING PLACED IN GNETS.

AND, THREE, HE WILL TESTIFY THAT GEORGIA CAN REASONABLY MODIFY ITS SERVICE DELIVERY SYSTEM TO PROVIDE APPROPRIATE SUPPORTS AND SERVICES IN GENERAL EDUCATION SCHOOLS.

WE -- IT MAY BE A RELIEF TO YOUR HONOR THAT THERE IS NO DISAGREEMENT THAT THE RELEVANT STANDARD IN THIS CASE WE AGREE THAT GENERALLY EXPERT ADMISSIBILITY TURNS ON EXPERTS' QUALIFICATIONS, THE RELIABILITY OF METHODOLOGY, AND THE RELEVANCY OF THE OPINIONS. AND THERE'S NO DISPUTE ABOUT DR. PUTNAM'S QUALIFICATIONS.

SO THE ONLY ISSUES BEFORE YOUR HONOR TODAY ARE THE RELIABILITY OF HIS METHODOLOGY AND HIS RELEVANCE. AND I'M GOING TO SPEAK FIRST TO THE RELIABILITY OF DR. PUTNAM'S METHODOLOGY.

I THINK YOU JUST HEARD THAT THE STATE CLAIMS THAT DR. PUTNAM EMPLOYED, QUOTE, LITTLE OR NO METHODOLOGY, CLOSED QUOTE. IN FACT, HIS REPORT IS IN THE RECORD AT 420 E.C.F. 428-1 FOR THIS COURT TO REVIEW. AND WITH THE COURT 'S PERMISSION, I'LL

PUT ON THE MONITOR JUST THE TABLE OF CONTENTS FOR THAT REPORT.

OKAY. THIS IS ACTUALLY JUST A PORTION OF THE -- CAN YOU SHOW THE FULL PAGE? THANK YOU.

THIS IS THE TABLE OF CONTENTS FOR THIS REPORT. AND AS YOU SEE, IT GOES THROUGH HIS QUALIFICATIONS.

AND THEN IF YOU CAN BLOW UP THE OTHER SECTIONS, PLEASE.

IT HAS HIS METHODOLOGY AS SECTION DESCRIBING HIS METHODOLOGY AND OTHER SECTIONS, WHICH I AM GOING TO NOW DESCRIBE TO YOU. HE CONSIDERED FOUR QUESTIONS.

FIRST, ARE THERE SUFFICIENT SERVICES AND SUPPORTS THAT CAN HELP KIDS WITH BEHAVIORAL DISABILITIES LEARN IN INTEGRATED SETTINGS. AND HE REVIEWED THAT AS A CLINICAL PSYCHOLOGIST WHO HAS WORKED WITH THESE KIDS AND WITH STATE SYSTEMS AND LOCAL SYSTEMS FOR OVER 50 YEARS. HE IS VERY FAMILIAR WITH THIS ISSUE.

AND HIS METHODOLOGY HERE WAS TO REVIEW THE PEER-REVIEWED LITERATURE AND OTHER ACADEMIC TEXTS THROUGH THE LENS OF HIS OWN EXPERIENCE. THIS IS A WELL-RECOGNIZED METHODOLOGY IN THE CASE LAW. AND HE CONCLUDED THAT THERE IS A BROAD SCIENTIFIC CONSENSUS THAT STUDENTS WITH BEHAVIOR-RELATED DISABILITIES WHO RECEIVED TIMELY APPROPRIATE SERVICES CAN AVOID RESTRICTIVE PLACEMENTS. MANY OF THESE JUDGMENTS HAVE BEEN ACCEPTED, NOT ONLY BY THE PEER-REVIEWED LITERATURE IN THE ACADEMIC COMMUNITY, BUT ALSO BY THE STATE, BY THE LEADING

AGENCY ON THIS TOPIC, THE DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL DISABILITIES. AND THE EVIDENCE AT TRIAL WILL SHOW THEIR WRITINGS TO THE SAME EFFECT.

THE SERVICES THAT HE RECOMMENDS INCLUDES SYSTEMS OF SUPPORTS SUCH AS POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, WHICH IS A MONITORING AND DETECTION AND WHOLE SCHOOL CLIMATE SUPPORT SYSTEM; AS WELL AS EVIDENCE-BASED SERVICES, WHICH ARE TYPICALLY THOSE PROVIDED THROUGH MEDICAID; THAT IS, RIGOROUS ASSESSMENTS CALLED FUNCTIONAL BEHAVIORAL ASSESSMENTS IN THIS FIELD; INDIVIDUAL GROUP AND FAMILY THERAPY AND CARE COORDINATION SERVICES. SO THAT'S WHAT HE LOOKED AT FOR PART THREE, STANDARDS OF CARE FOR SERVING STUDENTS WITH BEHAVIOR-RELATED DISABILITIES.

AS QUESTION TWO THAT WE ASKED HIM TO ANSWER, DOES GEORGIA CURRENTLY PROVIDE BEHAVIORAL HEALTH SERVICES IN SUFFICIENT QUANTITY OR INTENSITY TO SUPPORT KIDS IN GENERAL EDUCATION SETTINGS. TO ANSWER, HIS METHODOLOGY, WHICH IS SPELLED OUT SPECIFICALLY IN THE SUBSTANTIVE SECTION -- IN EACH OF THE SUBSTANTIVE SECTIONS I'M DESCRIBING, HE -- HE REVIEWED GEORGIA'S STATUTES, REGULATIONS, THE MEDICAID COVERAGE MANUAL, THE MEDICAID PLAN ITSELF.

HE REVIEWED DEPOSITIONS OF GEORGIA OFFICIALS AND PROVIDERS. AND HE VISITED 27 GNETS SCHOOLS, ONE GNETS CLASSROOM, ONE GNETS CENTER, AND 25 GENERAL EDUCATION SCHOOLS TO SEE WHAT WAS PROVIDED.

HE ALSO REVIEWED STATEWIDE DATA RECORDING ALL MEDICAID-REIMBURSED BEHAVIORAL HEALTH SERVICES FOR EVERY CHILD IN GEORGIA BETWEEN 2016 AND 2021. THIS IS NOT A MATTER OF REVIEWING SEVEN RECORDS. HE CONCLUDED THAT THE DATA SHOWED THAT RELATIVELY FEW CHILDREN IN GEORGIA RECEIVED THE KIND OF SERVICES THAT COULD IMPROVE THEIR FUNCTIONING AND PREVENT TRANSFERS TO RESTRICTED SETTINGS. AND THAT IS COVERED, YOUR HONOR, IN PART FIVE AND PART SIX OF HIS REPORT.

NEXT, HE LOOKED AT GNETS SPECIFICALLY. AND THE QUESTION THAT HE ANSWERED HERE WAS, DO GEORGIA KIDS GET ADEQUATE SERVICES BEFORE THE STATE ENROLLS THEM IN GNETS. AND IN ORDER TO ANSWER THAT, HIS METHODOLOGY WAS TO LOOK AT THE MEDICAID CLAIMS DATA, WHICH SHOWS ALL THE SERVICES THE KIDS RECEIVE, TO LOOK AT THESE RECORDS AND SERVICES FOR KIDS ENROLLED IN GNETS USING MEDICAID DATA FOR OVER 5,000 STUDENTS.

AND I SHOULD MENTION HERE THAT 80 PERCENT OF GNETS STUDENTS ARE ENROLLED IN EITHER MEDICAID OR PEACH CARE. AND USING THIS METHODOLOGY, HE FOUND THAT LARGE NUMBERS OF KIDS HAD NOT RECEIVED ANY OF THE CRITICAL SERVICES IN THE SIX MONTHS PRIOR TO THEIR ADMISSION TO GNETS OR EVEN IN THE ONE YEAR PRIOR TO THEIR ADMISSION TO GNETS. AND 25 PERCENT OF THESE STUDENTS WHO WERE ENROLLED IN GNETS HAD NOT RECEIVED ANY BEHAVIORAL HEALTH SERVICES AT ALL PRIOR TO THEIR TRANSFER TO GNETS.

THE NEXT QUESTION HE ANSWERED -- AND THIS IS IN PART EIGHT -- WHAT ARE THE REASONABLE STEPS THAT GEORGIA COULD TAKE

TO PREVENT UNNECESSARY GNETS PLACEMENT. AND HE FOUND THAT GEORGIA COULD REASONABLY MODIFY THEIR SYSTEM.

AND I'M JUST GOING TO TOUCH ON THE BRIEF, AND THE REPORT TOUCH ON MANY MORE SERVICES, BUT I'M JUST GOING TO SPEAK TO A FEW. THE NEEDED SERVICES ARE ALREADY INCLUDED IN GEORGIA'S MEDICAID PLAN. THOSE ARE THE SERVICES THAT ARE RECOMMENDED BY THE PEER-REVIEWED AND OTHER ACADEMIC LITERATURE. GEORGIA INCLUDES THEM IN THEIR MEDICAID PLAN. WHAT HE FOUND IS THAT THE KIDS ARE NOT RECEIVING THEM BEFORE THEY ARE PLACED IN A SEGREGATED SETTING.

HE ALSO FOUND THAT GEORGIA COULD EXPAND THE NEW APEX PROGRAM, WHICH IS THE BEHAVIORAL HEALTH, SCHOOL-BASED MENTAL HEALTH PROGRAM, AND EXPAND ITS EXISTING SCHOOL-BASED BEHAVIORAL HEALTH SERVICES.

HE SAID THAT GEORGIA SHOULD ENHANCE SYSTEMS LIKE POSITIVE BEHAVIOR AND INTERVENTIONS AND SUPPORTS TO EARLY IDENTIFY AND DEAL WITH THE CHILDREN WHO NEED -- NEED ADDITIONAL SUPPORT.

AND HE ALSO CONCLUDED THAT GEORGIA COULD ENSURE DELIVERY OF THE KEY SERVICES THROUGH MEDICAID BECAUSE THEY ARE INCLUDED IN THE MEDICAID PLAN. AND HE NOTED THAT THE COST OF MEDICAID SERVICES ARE BORNE IN LARGE PART BY THE FEDERAL GOVERNMENT. GEORGIA'S FEDERAL MATCH IS 65 PERCENT. SO ALMOST TWO OF EVERY THREE DOLLARS IT COSTS WOULD BE BORNE BY THE FEDERAL GOVERNMENT.

SO REVIEWING THIS REPORT SHOWS THERE IS SIMPLY NO MERIT TO THE STATE'S CLAIM THAT DR. PUTNAM DOES NOT USE OR DESCRIBE A RELIABLE METHODOLOGY FOR ANY OF THE SECTIONS OF THIS REPORT. HIS METHODOLOGY IS, IN THE WORDS OF THE 702 ADVISORY COMMITTEE QUOTED BY THE ELEVENTH CIRCUIT IN THE UNITED STATES VERSUS FRAZIER, 387 F.3D 1244 AT 1262, QUOTE, PROPERLY GROUNDED, WELL REASONED, AND NOT SPECULATIVE, END QUOTE.

NEXT I'LL SPEAK TO THE ISSUE OF RELEVANCY, WHETHER THE INFORMATION IN DR. PUTNAM'S REPORT WOULD BE OF ASSISTANCE TO THIS COURT AS TRIER OF FACT. A SIGNIFICANT ISSUE IN THIS CASE IS WHETHER KIDS ARE UNJUSTIFIABLY SEGREGATED IN GNETS WITHOUT HAVING BEEN PROVIDED APPROPRIATE SERVICES AND SUPPORTS IN INTEGRATED SETTINGS. DR. PUTNAM'S REPORT WILL UNDOUBTEDLY BE HELPFUL TO THE COURT ON THAT ISSUE.

WHY DOES THE STATE SAY IT'S NOT RELEVANT? THEY SAY HE DIDN'T CONSIDER CERTAIN ELEMENTS THE STATE CONSIDERS ARE LEGALLY REQUIRED, SUCH AS INDIVIDUALIZED SERVICES OR A COST ANALYSIS OR A WORKFORCE ANALYSIS. THEY SAY THAT THE STATE CLAIMS THAT DR. PUTNAM WAS MISINFORMED REGARDING CERTAIN ASPECTS, SUCH AS THE NATURE OF STATE FUNDING OR THE -- HOW THE STATE COULD COMPEL THE ADOPTION OF PBIS.

WE DISAGREE WITH THE CRITICISMS OF DR. PUTNAM AND THAT HIS ASSUMPTIONS ARE INACCURATE. BUT, NEVERTHELESS, THERE IS SUBSTANTIAL CASE LAW IN THE ELEVENTH CIRCUIT AND THE SEVENTH CIRCUIT AND ELSEWHERE, AND IT HOLDS THAT EXPERT OPINION SHOULD

NOT BE EXCLUDED ON GROUNDS OF ADMISSIBILITY BECAUSE IT DIDN'T COVER CERTAIN PURPORTED NECESSARY ELEMENTS OR FACTS.

AND AS THE ELEVENTH CIRCUIT SAID IN ROSENFELD VERSUS OCEANIA, 654 F.3D 1190, 1193, FAILURE TO INCLUDE VARIABLES WILL AFFECT THE PROBATIVENESS OF THE ANALYSIS BUT NOT ITS ADMISSIBILITY. AND INADEQUACIES GO TO WEIGHT, NOT ADMISSIBILITY.

AND TO TAKE LANGUAGE FROM AN ELEVENTH CIRCUIT DISTRICT COURT CASE IN THE SOUTHERN DISTRICT OF ALABAMA, KIRKSEY VERSUS SCHINDLER ELEVATOR RECENTLY QUOTED BY JUDGE JONES IN FAIR FIGHT VERSUS RAFFENSPERGER, A DAUBERT MOTION IS NOT A FACT OR MEANS OF ACHIEVING A SECOND BITE AT THE SUMMARY-JUDGMENT APPLE.

AS -- AS MR. BELINFANTE ACKNOWLEDGED, THE STANDARD IS FLEXIBLE IN A BENCH TRIAL WHERE THERE'S LESS NEED OF A GATEKEEPER TO KEEP THE GATE WHEN THE GATEKEEPER IS KEEPING THE GATE ONLY FOR HERSELF. AND THAT'S A PARAPHRASE, THE UNITED STATES VERSUS BROWN, YOUR HONOR, FOURTH -- 415 F.3D 1257, 1268 TO 1269.

THIS COURT HAS AMPLE ABILITY TO EVALUATE THE EXPERT TESTIMONY WITHOUT CONFUSION. ACCORDINGLY, THIS COURT SHOULD DENY THE STATE'S MOTION IN LIMINE TO EXCLUDE DR. PUTNAM'S TESTIMONY.

THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

FEEL LIKE I AM GOING TO GO GET A T-SHIRT THAT SAYS GATEKEEPER.

MS. COHEN: WE CAN ALL DO IT, YOUR HONOR.

MS. HERNANDEZ: YOUR HONOR, I'M GOING TO ADDRESS A FEW OF THE POINTS BROUGHT UP BY THE DOJ.

FIRST, YOUR HONOR, THIS -- THE DOJ'S CASE IS ALL ABOUT ADEQUATE, QUALITY -- THE ADEQUATE QUANTITY AND QUALITY OF SERVICES, AS IS DR. PUTNAM'S REPORT.

YOUR HONOR, THIS IS IMPORTANT TO NOTE, BECAUSE THAT'S WHAT THEY DEFINE AS THE PROPER STANDARD OF CARE. THAT IS INCORRECT. AS PREVIOUSLY STATED, TITLE II OF THE ADA DOES NOT REQUIRE STATES TO PROVIDE A CERTAIN QUALITY OR QUANTITY OF SERVICES. IT DOES NOT IMPOSE ON THE STATE A STANDARD OF CARE.

SECOND, YOUR HONOR, THE DOJ BRINGS UP THAT DR. PUTNAM'S TESTIFIES -- OR HIS TESTIMONY OR CONCLUSION IS THAT THE GEORGIA'S PRACTICES RESULTS IN STUDENTS BEING UNNECESSARILY SEGREGATED.

YOUR HONOR, DR. PUTNAM WAS NOT ABLE TO IDENTIFY A SINGLE STUDENT WHO WAS -- WHO WAS -- WHOSE IEP TEAM DIRECTED THEM TO NOT BE IN GNETS, THAT THAT SERVICE IS INAPPROPRIATE.

SECOND, YOUR HONOR, GEORGIA -- THE DOJ SAYS THAT GEORGIA CAN REASONABLY MODIFY ITS SUPPORTS AND SERVICES TO PROVIDE THE APPROPRIATE SERVICES. THEY SAY THAT THAT IS ONE OF THE THINGS THAT DR. PUTNAM IS GOING TO TESTIFY OR STATED IN HIS REPORT.

THAT'S INTERESTING, BECAUSE HE SAYS THAT HIS -- THAT GEORGIA SERVICES ARE REASONABLE AND THAT HIS RECOMMENDATIONS ARE REASONABLE. YET, HE DID NO COST STUDY OR WORKFORCE STUDY TO DETERMINE WHETHER THEY ACTUALLY ARE REASONABLE, WHETHER THEY ACTUALLY CAN BE IMPLEMENTED IN THIS STATE.

AND, YOUR HONOR, THAT IS ALL I HAVE.

THE COURT: ALL RIGHT.

MS. HERNANDEZ: THANK YOU.

THE COURT: THANK YOU.

OKAY. ALL RIGHT. SO THAT TAKES US WHERE NOW TO -- WE ONLY HAVE ONE MORE. OKAY. ARE WE TALKING ABOUT DANTE MCKAY NOW?

MS. ADAMS: YES, YOUR HONOR.

THE COURT: ALL RIGHT.

MS. ADAMS: MAY IT PLEASE THE COURT, CRYSTAL ADAMS FOR THE UNITED STATES.

I WILL BE RELYING ON A DEMONSTRATIVE THAT WILL BE DISPLAYED ON THE SCREEN MOMENTARILY.

AS IS SHOWN ON THE TIMELINE BEFORE YOU, ON NOVEMBER 7TH, 2023, NEARLY FOUR MONTHS BEFORE THE DEADLINE TO DISCLOSE REBUTTAL EXPERTS AND AFTER DISCOVERY HAD CLOSED, THE STATE INTRODUCED THE DECLARATION OF MR. DANTE MCKAY. THE THREE-PAGE DECLARATION CONTAINS OPINIONS ABOUT THE ESTIMATED COSTS OF EXPANDING THE STATE'S SCHOOL-BASED MENTAL HEALTH PROGRAM, APEX, TO EVERY PUBLIC SCHOOL IN THE STATE. BUT THE DECLARATION DOES

NOT EXPLAIN THE MULTI-FACETED ANALYSIS THAT INFORMS THE COST ESTIMATE AND SUPPORTS MR. MCKAY'S OPINIONS.

HE DOES NOT DESCRIBE WHO CONDUCTED THE ESTIMATE, WHEN THE ESTIMATE WAS CONDUCTED, OR WHY CERTAIN ASSUMPTIONS WERE USED. NEVERTHELESS, THE STATE PROFFERS THIS THREADBARE DECLARATION AS ITS SOLE EVIDENCE THAT STATEWIDE APEX EXPANSION WOULD FUNDAMENTALLY ALTER THE STATE'S PROGRAMS.

THE DECLARATION WAS PREPARED AFTER THE STATE RECEIVED THE REPORT OF OUR EXPERT, DR. ROBERT PUTNAM, WHO RECOMMENDED THAT GEORGIA REASONABLY MODIFY ITS PROGRAMS IN MULTIPLE WAYS, INCLUDING BY MAXIMIZING AVAILABLE MEDICAID FUNDING TO PROVIDE MORE APEX SERVICES.

TO BE CLEAR, DR. PUTNAM DID NOT RECOMMEND EXPANDING APEX STATEWIDE. SO THE COST ESTIMATE IS NOT AN ACCURATE ASSESSMENT OF THE REASONABLENESS OF DR. PUTNAM'S PROPOSED MODIFICATION.

THE UNITED STATES WAS JUSTIFIABLY SURPRISED WHEN GEORGIA INTRODUCED THE DECLARATION. THE STATE DID NOT PLEAD A FUNDAMENTAL ALTERATION DEFENSE. THE FIRST TIME THE STATE RAISED FUNDAMENTAL ALTERATION WAS IN ITS MOTION FOR SUMMARY JUDGMENT. WE REQUESTED DOCUMENTS DESCRIBING THE ANALYSIS ABOUT COSTS OF EXPANDING APEX. BUT AFTER A GOOD-FAITH SEARCH, WE DID NOT FIND THE COST ESTIMATE OR ITS BASIS, EVEN THOUGH WE REQUESTED THOSE DOCUMENTS DURING DISCOVERY.

WHEN WE DEPOSED MR. MCKAY, WE ASKED HIM IF DBHDD HAD

CONDUCTED ANY ANALYSIS OF THE COST OF EXPANDING APEX. HE ANSWERED NO. AFTER REVIEWING THE DECLARATION, WE ASKED GEORGIA TO CONFIRM THE DATE OF THE COST ESTIMATE AND WHETHER THEY PRODUCED THE COST ESTIMATE OR ANY SUPPORTING DOCUMENTS. THEIR ENTIRE RESPONSE WAS, QUOTE, MR. MCKAY'S AFFIDAVIT SPEAKS FOR ITSELF. TO THE EXTENT YOU DISAGREE, GIVEN THE TIMETABLE WE'RE OPERATING UNDER, THE ISSUE IS NOW ONE FOR SUMMARY JUDGMENT, END QUOTE.

ALLOWING THE STATE TO PROFFER THE DECLARATION IN THE 11TH HOUR WOULD UNFAIRLY PREJUDICE THE UNITED STATES. WE RELIED ON THE STATE'S CONDUCT WHEN IT DID NOT PLEAD A FUNDAMENTAL ALTERATION DEFENSE, WHEN IT DID NOT PRODUCE COST-ESTIMATE EVIDENCE SUPPORTING THE DECLARATION, WHEN MR. MCKAY TESTIFIED IN HIS DEPOSITION THAT DBHDD HAD NOT ANALYZED THE COST OF EXPANDING APEX, AND WHEN THE STATE FAILED TO DISCLOSE MR. MCKAY AS AN EXPERT.

HAD WE RECEIVED THE COST-ESTIMATE EVIDENCE DURING DISCOVERY, THE EVIDENCE COULD HAVE INFORMED OUR DECISIONS DURING DISCOVERY AND WHEN WE WROTE OUR DISPOSITIVE BRIEFS.

THE COURT SHOULD EXCLUDE THE DECLARATION FOR THE FOLLOWING REASONS:

FIRST, MR. MCKAY LACKS PERSONAL KNOWLEDGE OF THE BASIS FOR HIS OPINIONS AND APPARENTLY RELIES ON INADMISSIBLE HEARSAY.

SECOND, THE STATE FAILED TO DISCLOSE MR. MCKAY AS AN

EXPERT.

AND, THIRD, THE STATE'S FAILURE TO COMPLY WITH THE FEDERAL RULES AND THIS COURT'S ORDERS WAS NOT SUBSTANTIALLY JUSTIFIED OR HARMLESS.

THE FIRST BASIS FOR EXCLUSION IS, THE DECLARATION VIOLATES FEDERAL RULE OF CIVIL PROCEDURE 56. RULE 56 REQUIRES A DECLARATION IN SUPPORT OF A MOTION FOR SUMMARY JUDGMENT TO BE MADE ON THE WITNESS' PERSONAL KNOWLEDGE AND ADMISSIBLE FACTS.

THERE IS NO EVIDENCE THAT MR. MCKAY HAS SUCH PERSONAL KNOWLEDGE. NEITHER THE STATE NOR MR. MCKAY ASSERT THAT HE PERSONALLY CONDUCTED THE COST ESTIMATE OR WAS DIRECTLY INVOLVED IN THE PREPARATION OF THE ESTIMATE.

MR. MCKAY APPEARS TO RELY ON INADMISSIBLE HEARSAY. THE DECLARATION DOES NOT PROVIDE ANY UNDERLYING INFORMATION IN SUPPORT OF MR. MCKAY'S OPINIONS. THUS, IT APPEARS HE RELIES ON OUT-OF-COURT STATEMENTS THAT WERE PROVIDED TO HIM. THE STATE RELIES ON THIS BASELESS DECLARATION TO SUPPORT AND PROVE THEIR ALLEGED TRUTH OF THE MATTER, WHICH IS THAT ONE OF OUR PROPOSED MODIFICATIONS, EXPANDING APEX, WOULD FUNDAMENTALLY ALTER THE STATE'S PROGRAMS.

THE SECOND REASON THE COURT SHOULD EXCLUDE THE DECLARATION IS BECAUSE IT CONTAINS UNDISCLOSED EXPERT TESTIMONY. THE STATE IS TRYING TO PROFFER MR. MCKAY AS A REBUTTAL EXPERT IN LAY-WITNESS CLOTHING. THE STATE ADMITS IT TURNED TO MR. MCKAY IN RESPONSE TO DR. PUTNAM'S TESTIMONY

RECOMMENDING THAT THE STATE REASONABLY MODIFY ITS PROGRAMS, INCLUDING BY EXPANDING APEX. THE STATE IS ATTEMPTING TO AVOID ITS DISCOVERY OBLIGATIONS BY PROFFERING THIS DECLARATION AS LAY TESTIMONY.

THIS IS THE EXACT BEHAVIOR THAT THE RULE 701 ADVISORY COMMITTEE SOUGHT TO GUARD AGAINST WHEN IT MADE CLEAR THAT TESTIMONY BASED ON SPECIALIZED KNOWLEDGE UNDER RULE 702 IS NOT LAY TESTIMONY. THE DECLARATION CONTAINS EXPERT OPINION BECAUSE IT IS BASED ON A MULTI-FACETED COST ESTIMATE ANALYSIS REQUIRING AN UNDERSTANDING OF EXISTING APEX PROGRAM PROVIDERS, THE NUMBER OF SCHOOLS AND STUDENTS THEY SERVE, THEIR MEDICAID BILLING PRACTICES, AND THE MEDICAID REIMBURSEMENT PROCESS, AMONG MANY OTHER FACTORS. THIS MULTI-FACETED COST ESTIMATE IS THE WORK OF AN EXPERT AND SHOULD HAVE BEEN DISCLOSED ACCORDINGLY.

FINALLY, THE COURT SHOULD EXCLUDE THE DECLARATION BECAUSE THE STATE'S FAILURE TO FULFILL ITS DISCOVERY OBLIGATIONS WAS NOT SUBSTANTIALLY JUSTIFIED OR HARMLESS. FEDERAL RULE OF CIVIL PROCEDURE 37 REQUIRES A PARTY WHO VIOLATES RULE SIX -- EXCUSE ME, 26(A) OR (E) TO DEMONSTRATE THAT ITS CONDUCT WAS SUBSTANTIALLY JUSTIFIED OR HARMLESS. THE STATE HAS NOT MET ITS BURDEN HERE.

THE STATE'S CONDUCT WAS NOT HARMLESS. WE RELIED ON THE STATE'S DECISION NOT TO PLEAD A FUNDAMENTAL ALTERATION AFFIRMATIVE DEFENSE. AND DURING THREE YEARS OF DISCOVERY, WE RELIED ON THE STATE'S DISCOVERY DISCLOSURES, INCLUDING MR.

MCKAY'S DEPOSITION TESTIMONY, THAT DBHDD HAD NOT ANALYZED THE COST OF EXPANDING APEX AND THE STATE'S DECISION NOT TO DISCLOSE MR. MCKAY AS AN EXPERT.

HAD THE STATE COMPLIED WITH OUR DISCOVERY -- EXCUSE ME, WITH ITS DISCOVERY OBLIGATIONS, OUR EXPERTS COULD HAVE REBUTTED THE COST ESTIMATE EVIDENCE, AND WE COULD HAVE CONSIDERED THAT EVIDENCE AS WE WROTE OUR DISPOSITIVE BRIEF.

COURTS HAVE FOUND SEVERE PREJUDICE WHEN A PARTY DISCLOSED NEW EVIDENCE AFTER THE DISCOVERY PERIOD CLOSED AND THE OPPOSING PARTY HAD RELIED ON THAT DISCLOSING PARTY'S DISCOVERY DISCLOSURES WHEN THE OPPOSING PARTY SERVED DISCOVERY REQUESTS, TOOK DEPOSITIONS, RETAINED EXPERTS, AND WROTE DISPOSITIVE MOTIONS. COURTS HAVE REJECTED THIS KIND OF GAMESMANSHIP, AND THIS COURT SHOULD DO THE SAME.

IN ADDITION, THE STATE'S CONDUCT WAS NOT SUBSTANTIALLY JUSTIFIED. THE STATE WOULD HAVE THIS COURT BELIEVE THAT GEORGIA JUST HAPPENED TO RECEIVE THE DECLARATION THE DAY BEFORE IT FILED ITS MOTION FOR SUMMARY JUDGMENT. BUT THE STATE HAD AMPLE NOTICE OF OUR PROPOSED REASONABLE MODIFICATIONS. IT COULD HAVE DISCLOSED MR. MCKAY AS AN EXPERT DURING DISCOVERY.

AS THE TIMELINE BEFORE YOU SHOWS, ON MARCH 10TH, 2023, FIVE MONTHS BEFORE EXPERT DISCOVERY CLOSED, WE EXPRESSLY NOTIFIED THE STATE OF OUR PROPOSED APEX EXPANSION, AND WE REMINDED THE STATE OF OUR PROPOSED APEX EXPANSION WHEN WE

DISCLOSED DR. PUTNAM'S EXPERT REPORT ON JUNE 16TH, 2023, SIX WEEKS BEFORE THE DEADLINE TO DISCLOSE REBUTTAL EXPERTS.

THE STATE HAD EVERY OPPORTUNITY TO TIMELY IDENTIFY AN EXPERT TO SUPPORT ITS FUNDAMENTAL ALTERATION ARGUMENTS. FOR THESE REASONS, THE UNITED STATES RESPECTFULLY REQUESTS THE COURT GRANT ITS MOTION TO EXCLUDE.

I'LL RESERVE THE REMAINDER OF MY TIME FOR REBUTTAL.

THE COURT: THANK YOU.

MR. PICO-PRATS: GOOD AFTERNOON, YOUR HONOR.

THE COURT: GOOD AFTERNOON.

MR. PICO-PRATS: YOUR HONOR, YOU'VE HEARD TODAY WHY THE DEPARTMENT OF JUSTICE THINKS THAT MR. MCKAY'S DECLARATION SHOULD BE EXCLUDED. LET ME EXPLAIN TO YOU WHY THE DEPARTMENT OF JUSTICE IS SO CONCERNED AT THIS POINT ABOUT EXCLUDING MR. MCKAY'S DECLARATION.

THE COURT: AND ANNOUNCE YOUR NAME ONE MORE TIME.

MR. PICO-PRATS: MY NAME IS JAVIER PICO.

THE COURT: ALL RIGHT.

MR. PICO-PRATS: HERE'S A TIMELINE TO BETTER GUIDE US THROUGH THIS. AS YOU'RE WELL AWARE, THIS CASE HAS BEEN ONGOING SINCE AUGUST 23, 2016. AFTER A STAY, THE CASE WAS PUT ON AN EIGHT-MONTH DISCOVERY TRACK BEGINNING ON JUNE 25TH, 2020. AND AFTER VARIOUS EXTENSIONS, FACT DISCOVERY OFFICIALLY CLOSED ON MARCH 10, 2023.

DURING THOSE TWO YEARS AND EIGHT MONTHS, DANTE MCKAY

SAT FOR TWO DEPOSITIONS. THE DEPARTMENT OF JUSTICE SERVED THREE SETS OF INTERROGATORIES TO THE STATE. AND DESPITE ALL OF THAT, THE DEPARTMENT OF JUSTICE DIDN'T ASK ONE SINGLE TIME HOW MUCH IT WOULD COST TO EXPAND THE APEX PROGRAM. IT WAITED UNTIL FILING DR. PUTNAM'S EXPERT REPORT ON JUNE 16, 2023, TO LET US KNOW THAT. THEY HAVE NOW CLAIMED THAT THEY TOLD US ON MARCH 10TH, BUT WE WERE NOT AWARE OF THAT.

AND AS MR. BELINFANTE DISCUSSED BEFORE, COST AND WORKFORCE CONCERNS ARE NECESSARY ELEMENTS OF A REASONABLE ACCOMMODATION, AS DISCUSSED IN THE OLMSTEAD CASE. THE DOJ'S FAILURE TO DO THAT DOES NOT MEAN THAT MR. MCKAY'S DECLARATION SHOULD BE EXCLUDED. IN FACT, THE ONLY CASE DISCUSSING A FUNDAMENTAL ALTERATION DEFENSE IS THE BROOKLYN CENTER FOR INDEPENDENCE OF DISABLED V. BLOOMBERG. AND THAT'S OUT OF THE SOUTHERN DISTRICT OF NEW YORK. AND IN THAT CASE ITSELF, IT STATED THAT DEFENDANTS COULD NOT REASONABLY BE EXPECTED TO HAVE PLEADED DEFENSE TO A CLAIM NOT PRESENTED.

AND, REGARDLESS, YOUR HONOR, DESPITE WHAT THE DOJ MAY THINK, IF THIS COURT RULES TO STRIKE THE DECLARATION OF DR. MCKAY, IT IS NOT DISPOSITIVE OF THE STATE'S MOTION FOR SUMMARY JUDGMENT, AND IT SHOULD STILL BE GRANTED.

NOW, DISCUSSING THE DEPARTMENT OF JUSTICE'S ARGUMENTS IN ORDER, FIRST, THE DECLARATION IS ADMISSIBLE AT SUMMARY JUDGMENT BECAUSE IT MEETS THE REQUIREMENTS OF FEDERAL RULES OF CIVIL PROCEDURE 56(C)(4). THERE'S THREE ELEMENTS TO THAT, THE

FIRST BEING PERSONAL KNOWLEDGE. MR. MCKAY HAS PERSONAL KNOWLEDGE ON THIS, AS HE STATED IN PARAGRAPH TWO OF HIS DECLARATION, THAT HE HAS ACQUIRED FIRSTHAND KNOWLEDGE OF THE BUSINESS OPERATIONS FOR THE DBHDD. IN FACT, HE'S BEEN WORKING AT DBHDD SINCE FEBRUARY 16, 2016.

IN THE DOJ'S MOTION, THEY EVEN SAY AS MUCH. THEY SAY THAT MR. MCKAY, AND I QUOTE, DEMONSTRATED HIS DETAILED UNDERSTANDING OF THE APEX PROGRAM, SUCH AS THE FUNDING SOURCES FOR MULTIPLE EXPANSIONS OF THE PROGRAM. THEY GO ON TO SAY, AND, AGAIN, I QUOTE, HE IS ONE OF THE STATE EMPLOYEES MOST KNOWLEDGEABLE ABOUT APEX.

IT'S CLEAR THAT HE HAS PERSONAL KNOWLEDGE ON THE MATTER, YOUR HONOR.

SECOND, THE DECLARATION MUST SET OUT FACTS THAT WOULD BE ADMISSIBLE IN EVIDENCE. IT'S ADMISSIBLE BECAUSE MR. MCKAY HAS FIRSTHAND KNOWLEDGE OF THE BUSINESS OPERATIONS WITHIN DBHDD, AND ANY ARGUMENT THAT THIS HAS COME THROUGH HEARSAY IS PURE SPECULATION FROM THE PLAINTIFFS, YOUR HONOR. THEY HAVE PROVIDED NO EVIDENCE THAT THIS IS HEARSAY. AND, AS SUCH, THAT SHOULD BE IGNORED.

BUT THEY DID NOT NEED TO BE -- THIS DID NOT NEED TO BE DISCLOSED DURING DISCOVERY, YOUR HONOR. THIS DOCUMENT WAS CREATED IN NOVEMBER OF 2023, PARTLY DUE TO DR. PUTNAM'S EXPERT REPORT. ANY ARGUMENT THAT THIS HAD TO BE DISCLOSED DUE TO AN RFP OR EITHER REQUEST FOR ADMISSION OR INTERROGATORY IS NOT

TRUE, BECAUSE IT WAS NOT IN EXISTENCE AT THE TIME. WE DID NOT HAVE TO CREATE THIS DOCUMENT.

FURTHERMORE, THEY HAD THE OPPORTUNITY TO ASK FOR THIS THROUGHOUT THE THREE SETS OF INTERROGATORIES THEY SENT US OR THROUGHOUT THE TWO DEPOSITIONS THAT MR. MCKAY SAT FOR, AND THEY FAILED TO DO EITHER.

AND, FINALLY, THE DECLARATION MUST SHOW THAT THE DECLARANT IS COMPETENT TO TESTIFY ON THE MATTER. DOJ DOES NOT ARGUE THIS IN EITHER OF THEIR BRIEFS. THEY DO NOT ARGUE THAT MR. MCKAY IS NOT COMPETENT. AND MR. MCKAY IS COMPETENT, AS HE STATED IN PARAGRAPH ONE OF THE DECLARATION, TO MEET THE LEGAL REQUIREMENTS.

SECOND, THE DECLARATION DOES NOT CONTAIN AN EXPERT OPINION. EXPERT -- LAY FACT WITNESS OPINIONS ARE GOVERNED BY THE FEDERAL RULES OF CIVIL PROCEDURE 701. THERE IT STATES THAT, IN ORDER FOR A WITNESS TO OFFER A LAY OPINION, A, MUST RATIONALLY BASE ON THE WITNESS' PERCEPTION.

B, BE HELPFUL TO CLEARLY UNDERSTANDING THE WITNESS' TESTIMONY OR DETERMINING AN ISSUE IN FACT.

AND, C, NOT BASED ON SCIENTIFIC, TECHNICAL, OR OTHER SPECIALIZED KNOWLEDGE WITHIN THE SCOPE OF RULE 702.

THE ADVISORY COMMITTEE SHEDS A LITTLE MORE INSIGHT ON THIS BY STATING THAT SUCH OPINION TESTIMONY IS ADMITTED, NOT BECAUSE OF EXPERIENCE, TRAINING, OR SPECIALIZED KNOWLEDGE WITHIN THE REALM OF AN EXPERT, BUT BECAUSE OF THE

PARTICULARIZED KNOWLEDGE THAT THE WITNESS HAS BY VIRTUE OF HIS OR HER OWN POSITION IN THE BUSINESS.

IN TAMPA BAY SHIP BUILDING CODE, THE ELEVENTH CIRCUIT STATED THAT LAY TESTIMONY IS ALLOWED IF GARNERED BY VIRTUE OF THE LAY WITNESS' POSITION IN THE BUSINESS.

NOW, THE DOJ ATTEMPTS TO DISTINGUISH THE TAMPA BAY CASE BY STATING THAT, THERE, THE WITNESS IN QUESTION WAS DIRECTLY INVOLVED IN SHIP-LOADING REPAIRS PROCESS AND WAS RESPONSIBLE FOR APPROVING INITIAL QUOTATION OF REPAIRS. HOWEVER, AS I'LL EXPLAIN SHORTLY, MR. MCKAY WAS JUST AS INVOLVED IN THE DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL DISABILITIES.

MR. MCKAY IS A DIRECTOR OF THE OFFICE OF CHILDREN, YOUNG ADULTS, AND FAMILIES IN THE BEHAVIORAL HEALTH DIVISION OF DBHDD. AND HE'S HELD THAT POSITION SINCE FEBRUARY 16, 2016. AND MR. MCKAY HAS STATED IN HIS DEPOSITION THAT APEX IS A PROGRAM THAT HIS DIVISION FUNDS, EVALUATES, AND MONITORS. AND THAT CAN BE FOUND IN HIS DEPOSITION TESTIMONY IN DOCUMENT 451-1 AT 14.

HE WENT ON TO SAY THAT, AS THE OFFICE DIRECTOR, HE APPROVES THE APEX PROGRAM. HE RECEIVES REPORTS ON THE PERFORMANCE TO THE PROGRAM AND HAS A ROLE IN THE PROCUREMENT THAT LED TO THE PROVIDERS SELECTED FOR THE PROGRAM, SAME DOCUMENT AT PAGE 16.

NOW, TO BRIEFLY DISCUSS THE CALCULATION THAT'S IN

QUESTION THAT HE PROVIDED IN HIS DECLARATION --

THE COURT: I'M SORRY, COUNSELOR. I JUST WANT TO MAKE SURE I'M WITH YOU. YOU ARE ABOUT TO EXPLAIN CALCULATIONS FROM THIS WITNESS THAT YOU ARE DESCRIBING AS A LAY WITNESS AND SAYING THIS IS NOT EXPERT TESTIMONY?

MR. PICO-PRATS: CORRECT.

THE COURT: OKAY. ALL RIGHT. I JUST WANT TO MAKE SURE I HEARD YOU CORRECTLY.

GO AHEAD.

MR. PICO-PRATS: YES, MA'AM.

AND I'LL EXPLAIN, BECAUSE THERE IS CASE LAW THAT TALKS ABOUT -- FROM THE ELEVENTH CIRCUIT AND THIS COURT -- THAT SPEAKS ABOUT WHY CALCULATIONS CAN BE PROVIDED BY FACT WITNESSES.

FIRST, IF YOU ARE LOOKING AT THIS COURT, IN THE KIPPERMAN V. ONEX CORP. CASE, IT STATES, THEY QUOTE, A BUSINESS OWNER IS NOT PERMITTED TO GIVE LAY TESTIMONY ON MATTERS THAT GO BEYOND STRAIGHTFORWARD COMMON SENSE CALCULATIONS.

THE ELEVENTH CIRCUIT FOUND IN THE UNITED STATES V. HAMAKER CASE THAT AN EXPERIENCED FINANCIAL ANALYST DID NOT NEED TO BE CERTIFIED AS AN EXPERT WITNESS BECAUSE THE WITNESS, AND I QUOTE, SIMPLY ADDED AND SUBTRACTED NUMBERS AND THEN COMPARED THOSE NUMBERS IN A STRAIGHTFORWARD FASHION. THAT CAN BE FOUND AT 455 F.3D 1316.

AND THIS COURT AGAIN FOUND THAT A TESTIMONY PROFFERED

BY COMPANY'S ACCOUNTANT DID NOT CONSTITUTE EXPERT EVIDENCE BECAUSE THE WITNESS, AND I QUOTE, PRESENTED SIMPLE GRADE-SCHOOL-LEVEL ARITHMETIC BASED ON THE DATA CONTAINED IN THE ACTUARIAL REPORTS.

THE COURT: AND YOUR POSITION IS, THAT IS ALL THAT THIS WITNESS DID?

MR. PICO-PRATS: CORRECT.

THE COURT: IS --

MR. PICO-PRATS: AND I'LL SHOW THAT SOON. BUT, YES, IT'S CORRECT.

THE COURT: OKAY. OKAY. I'M GOING TO HANG WITH YOU. OKAY.

MR. PICO-PRATS: AND THE LAST THING I'LL QUOTE FROM THE SAME CASE IS THAT THE EXPERT ENGAGED IN NOTHING MORE THAN CLEAR ADDITION AND DIVISION EXERCISES. AND THAT'S FROM THE GEORGIA SELF-INSURERS FUND V. PMA MANAGEMENT CORP. FOUND AT 143 F.SUPP.3D 1317 FROM THIS VERY COURT.

NOW, HERE, LOOKING AT THE CALCULATION WHICH I HAVE ON THE BOARD, IT'S ONLY ONE DIVISION FOLLOWED BY ONE MULTIPLICATION. MR. MCKAY TOOK THE ESTIMATED NUMBER OF STUDENTS. HE DIVIDED THE NUMBER BY 50, BECAUSE IT'S 50 STUDENTS PER ONE THERAPIST, AND THEN HE MULTIPLIED THAT NUMBER BY THE OUTER SALARY OF THE THERAPIST TO ARRIVE AT THE NUMBER THAT WE HAVE.

AND, YOUR HONOR, AS STATED BEFORE, THIS IS COMMON

SENSE CALCULATION, STRAIGHTFORWARD: ONE DIVISION, ONE MULTIPLICATION. A GRADE-SCHOOL STUDENT COULD DO THIS. AND THE ACTUAL VALUES THEMSELVES ARE OBTAINED, AS STATED BY THE TAMPA BAY CASE, FROM HIS ACTUAL EXPERIENCE AT DBHDD.

IN TERMS OF THE WORKFORCE SHORTAGES, IT'S NO SECRET PARTICULAR TO THE DOJ THAT GEORGIA HAS SUFFERED FROM WELL-DOCUMENTED AND ONGOING WORKFORCE SHORTAGES FOR MENTAL HEALTH PROFESSIONALS IN THIS STATE. AND THEY KNOW THAT BECAUSE WE'VE PROVIDED NUMEROUS DOCUMENTS THROUGHOUT DISCOVERY. AND THOSE ARE ALL LISTED IN OUR RESPONSE BRIEF TO THEIR MOTION.

AND, FURTHERMORE, MR. MCKAY TESTIFIED ABOUT THIS EXTENSIVELY THROUGHOUT HIS TWO DEPOSITIONS. AND THOSE CITATIONS ARE ALSO LISTED IN OUR RESPONSE BRIEF.

AND THEN FINALLY, YOUR HONOR, THE STATE HAS COMPLIED WITH RULE 26 OBLIGATIONS DURING DISCOVERY. THE STATE WAS NOT REQUIRED TO PERFORM ANY ANALYSIS IN RESPONSE TO THE DEPARTMENT OF JUSTICE. AND IT WAS ONLY REQUIRED TO PRODUCE EXISTING DOCUMENTS THE STATE HAD PREVIOUSLY.

THIS DECLARATION CAME INTO EXISTENCE ON NOVEMBER 6, 2023. AND ANY -- ANY TYPE OF ARGUMENT OTHERWISE IS PURE SPECULATION.

THIS WAS FILED THE FOLLOWING DAY ON NOVEMBER 7, 2023. AND, THUS, IT WAS TIMELY DISCLOSED. THE DOJ'S ARGUMENT THAT THE FEDERAL RULES OF CIVIL PROCEDURE 26(E) REQUIRED DISCLOSURE IS NOT TRUE BECAUSE THE FEDERAL RULE DOES NOT STATE THAT. THAT

ONLY APPLIES TO INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS, AND REQUESTS FOR ADMISSIONS.

SINCE THIS WAS NOT IN EXISTENCE, THIS DOES NOT NEED TO BE DISCLOSED DURING THOSE. AND THE ONLY ONE THAT APPLIES TO SUPPLEMENTING EXPERT TESTIMONY IS RULE 26(A)(2)(B). AND, AGAIN, MR. MCKAY WAS NOT DISCLOSED AS AN EXPERT, PURPOSEFULLY SO.

AND, FINALLY, THE DEPARTMENT OF JUSTICE CAN'T SHOW PREJUDICE. THEY CITE IN THEIR REPLY BRIEF TO FTC V. NATIONAL UROLOGICAL GROUP TO STATE THAT THIS IS A TRIAL BY AMBUSH. AND, YOUR HONOR, THERE, THAT CASE WAS TALKING ABOUT A WITNESS WHICH WAS NOT ABLE TO BE DEPOSED.

THEY CAN'T SHOW PREJUDICE HERE BECAUSE MR. MCKAY WAS DEPOSED TWICE AT TWO EXTENSIVE DEPOSITIONS. AND THE DEPARTMENT OF JUSTICE HAS HAD INFORMATION ABOUT THE APEX PROGRAM ALL THROUGHOUT DISCOVERY FOR THE TWO YEARS -- TWO MONTHS -- TWO YEARS AND EIGHT MONTHS. THE DEPARTMENT OF JUSTICE CHOSE NOT TO IDENTIFY A REASONABLE ACCOMMODATION AS A REMEDY UNTIL THEIR EXPERT REPORT. AND THEY FAILED TO CONDUCT AN ANALYSIS. AND THROUGH BINDING PRECEDENT THROUGH THE OLMSTEAD CASE, THAT WAS A KEY ELEMENT OF A REASONABLE ACCOMMODATION.

AND, YOUR HONOR, FOR THESE REASONS, THE DEPARTMENT'S MOTION TO INCLUDE THE DECLARATION OF MR. MCKAY SHOULD BE DENIED.

THE COURT: OKAY. THANK YOU.

MS. ADAMS: YOUR HONOR, THIS MOTION IS A SIMPLE MATTER OF FAIRNESS. WE ARE ASKING THE COURT TO EXCLUDE THE DECLARATION SO WE CAN AVOID BEING PREJUDICED BY THE STATE'S VIOLATION OF ITS OWN DISCOVERY OBLIGATIONS.

AS I SAID EARLIER, WE ASKED THE STATE TO PRODUCE DOCUMENTS DESCRIBING THE COST OF APEX EXPANSION. AND YOU CAN SEE THAT CLEARLY INDICATED ON THE TIMELINE BEFORE YOU ON DECEMBER 22ND. THAT'S WHEN WE SENT THAT REQUEST TO THE STATE.

THE STATE ALSO REFERENCED THAT MR. MCKAY'S FIRSTHAND KNOWLEDGE OF DBHDD'S OPERATIONS IS SUFFICIENT TO SATISFY THE PERSONAL KNOWLEDGE OR PARTICULARIZED KNOWLEDGE REQUIREMENT. THAT IS NOT THE CASE. IT'S VERY IMPORTANT THAT WE FOCUS ON THE TEXT OF THE DECLARATION ITSELF. THE DECLARATION IS DEFICIENT ON ITS FACE. IT IS A THREE-PAGE BASELESS DECLARATION. THE ONLY DISCUSSION OF MR. MCKAY'S KNOWLEDGE IS THE ONE SENTENCE TALKING ABOUT HIS PERSONAL FIRSTHAND KNOWLEDGE OF DBHDD'S OPERATIONS.

THAT KIND OF KNOWLEDGE IS NOT SUFFICIENT, AND COURTS HAVE AGREED WITH OUR ASSESSMENT. IN THE GALLAGHER CASE OUT OF THE NORTHERN DISTRICT OF GEORGIA, THERE WAS A CORPORATE REPRESENTATIVE PROFFERED AS A LAY WITNESS. HE HAD 15 YEARS OF EXPERIENCE IN THE COMPANY. BUT THE COURT FOUND THAT HE DID NOT HAVE SUFFICIENT PERSONAL KNOWLEDGE OR PARTICULARIZED KNOWLEDGE BECAUSE HE WAS NOT FAMILIAR WITH THE BASIS OF THE OPINIONS HE WAS MAKING. HE DID NOT HAVE ANY UNDERSTANDING OF THE

UNDERLYING INFORMATION. THE COURT FOUND HE RELIED ON HEARSAY INFORMATION. AND HE WAS TALKING ABOUT THINGS THAT WERE NOT A PART OF HIS ORDINARY COURSE OF EMPLOYMENT.

THE SAME THING IS TRUE HERE. THERE IS NO EVIDENCE ASSERTED IN THE DECLARATION OR IN THE STATE'S BRIEFS THAT MR. MCKAY WAS PERSONALLY INVOLVED IN PREPARING THE DECLARATION -- EXCUSE ME, THE COST ESTIMATE. AND THE STATE HAS NOT PROVIDED ANY EVIDENCE OF THE CALCULATIONS PERFORMED. THE SLIDE THAT THEY SHOWED TITLED APEX EXPANSION CALCULATION SLIDE IS NOWHERE TO BE FOUND IN THE DECLARATION. IT'S NOT MENTIONED IN THEIR BRIEF. THIS IS BRAND NEW INFORMATION THAT WE'RE JUST HEARING ABOUT TODAY.

THIS IS AN EXAMPLE OF, UNFORTUNATELY, THE TYPE OF IMPROPER GAMESMANSHIP THAT OTHER COURTS HAVE SAID IS NOT ACCEPTABLE AND UNDULY PREJUDICES THE OTHER PARTY.

IN ADDITION, THE STATE REFERENCES THE TAMPA BAY CASE, AN ELEVENTH CIRCUIT CASE. THAT IS CLEARLY DISTINGUISHABLE HERE. IN THAT CASE, THERE WERE THREE OFFICERS WHO WERE EMPLOYED BY A SHIPBUILDING COMPANY. THEY WERE INTIMATELY INVOLVED IN SHIPBUILDING REPAIRS AND ASSESSING THE REASONABLENESS OF THE BILLING FOR THOSE REPAIRS.

THAT IS NOT THE CASE HERE. THERE IS NO EVIDENCE THAT MR. MCKAY ROUTINELY ENGAGES IN COST ESTIMATE ANALYSIS FOR STATEWIDE EXPANSION OF A PROGRAM LIKE APEX. NOTHING IN THE DECLARATION OR ANY OF THE STATE'S ARGUMENTS ASSERT THAT HE HAS

THAT KIND OF PERSONAL KNOWLEDGE.

IN ADDITION, AS I THINK YOUR HONOR'S QUESTIONS WERE ALLUDING TO, THIS TESTIMONY REALLY IS MORE EXPERT TESTIMONY THAN LAY OPINION BECAUSE IT IS BASED ON COMPLICATED CALCULATIONS. THIS IS NOT SIMPLE MATH. THIS IS INVOLVING A MULTI-FACETED ANALYSIS THAT INCLUDES A CONSIDERATION OF MEDICAID COVERAGE.

THE WHOLE REASON DR. PUTNAM DISCUSSED EXPANDING APEX WAS BECAUSE HE BELIEVES THAT THE STATE CAN LEVERAGE AVAILABLE MEDICAID FUNDING TO EXPAND THE PROGRAM. IN ORDER TO TALK ABOUT A COST ANALYSIS REGARDING MEDICAID FUNDING, YOU NEED TO KNOW CURRENT MEDICAID BILLING PRACTICES FOR YOUR PROVIDERS. YOU ALSO NEED TO KNOW IF YOU'RE GOING TO ADD ADDITIONAL MEDICAID PROVIDERS TO YOUR SYSTEM AND WHAT KINDS OF SERVICES THEY ARE GOING TO PROVIDE, HOW MANY MORE SCHOOLS, HOW MANY MORE STUDENTS. ALL OF THESE ARE COMPLICATED FACTORS.

AND IN THE WHITE CASE FROM THE SIXTH CIRCUIT, THAT COURT FOUND THAT THE LOWER COURT ERRED IN ALLOWING MEDICAID -- EXCUSE ME, MEDICARE AUDITORS FROM TESTIFYING AS LAY WITNESSES ABOUT MEDICARE COVERAGE, MEDICARE REIMBURSEMENT PRACTICES, NEW PROVIDERS. SO THAT CASE IS VERY HELPFUL TO THE COURT HERE IN SHOWING THAT THIS IS COMPLICATED EXPERT ANALYSIS THAT SHOULD NOT BE ALLOWED AS LAY TESTIMONY.

THE FINAL THING I'LL SAY, YOUR HONOR, IS, I'M NOT SURE WHY THE STATE IS SAYING THAT IT DID NOT HAVE NOTICE OF OUR

REASONABLE MODIFICATIONS. AS I DISCUSSED BEFORE, ON MARCH 10TH, 2023, THAT WAS FIVE MONTHS BEFORE EXPERT DISCOVERY CLOSED. AS YOU SEE ON OUR TIMELINE, WE EXPRESSLY NOTIFIED THE STATE OF OUR PROPOSED REASONABLE MODIFICATION.

WE SAID, QUOTE, THE STATE CAN ALSO APPROPRIATELY ADDRESS THE NEEDS OF STUDENTS CURRENTLY SEGREGATED IN THE GNETS PROGRAM THROUGH REASONABLE MODIFICATIONS TO THE STATE SYSTEM FOR DELIVERING COMMUNITY-BASED SERVICES, INCLUDING -- AND THEN WE GO ON TO SAY -- BY EXPANDING APEX -- EXCUSE ME, BY EXPANDING ACCESS TO SCHOOL-BASED INTERVENTIONS AND SUPPORTS SUCH AS THOSE OFFERED THROUGH APEX. THAT'S AN EXCERPT FROM OUR RESPONSE ON MARCH 10TH.

SO THEY HAD SUFFICIENT KNOWLEDGE THAT THIS WAS WHAT WE WERE PROPOSING, AND THEY COULD HAVE IDENTIFIED MR. MCKAY OR AT LEAST DISCLOSED WHATEVER EVIDENCE CALCULATIONS, WHATEVER THEY WANTED TO RELY ON IN ORDER TO INTRODUCE THIS DECLARATION.

SO WITH THAT, I WILL RESPECTFULLY REQUEST THAT THE COURT GRANT OUR MOTION. THANK YOU.

THE COURT: THANK YOU.

ALL RIGHT. AND THEN, FINALLY, I THINK WE HAVE DR. ANDREW WILEY.

MR. GILLESPIE: MAY IT PLEASE THE COURT --

THE COURT: YES, SIR.

MR. GILLESPIE: -- COUNSEL, MATTHEW GILLESPIE FOR THE UNITED STATES.

AT ISSUE BEFORE THE COURT TODAY IS A LIMITED, NARROW MOTION BY THE UNITED STATES TO PREVENT THE STATE FROM ELICITING WHAT THE STATE'S REBUTTAL EXPERT FROM PROVIDING UNHELPFUL AND INADMISSIBLE TESTIMONY. WE DO NOT SEEK OVERBROAD EXCLUSION OF DR. WILEY'S TESTIMONY OR REPORT IN ITS ENTIRETY. INSTEAD, THE MOTION CENTERS ON TWO CATEGORIES OF TESTIMONY DR. WILEY OFFERS AND WILL LIKELY BE CALLED TO OFFER THAT WOULD WASTE THE COURT'S TIME AND CONFUSE THE ISSUES, IF PERMITTED, TO BE OFFERED AT TRIAL.

AS BRIEFING MAKES CLEAR, THERE'S ACTUALLY VERY LITTLE ABOUT THE FACTUAL BASES WITH THE MOTION WITH WHICH THE STATE DISAGREES. AS A RESULT, I'LL BRIEFLY DISCUSS BOTH WILEY OPINIONS DR. WILEY OFFERS IN SECTION ONE OF HIS REBUTTAL REPORT ARE INADMISSIBLE LEGAL OPINION TESTIMONY AND WHY THE STATE'S BRIEF MAKES CLEAR THAT AN ORDER FROM THIS COURT PREVENTING DR. WILEY FROM TESTIFYING ABOUT THE GNETS PROGRAM IS APPROPRIATE.

FIRST, AS THE COURT IS AWARE, THE UNITED STATES MOVED TO EXCLUDE SECTION ONE OF DR. WILEY'S REBUTTAL REPORT, AS WELL AS THE NEW TESTIMONY DR. WILEY OFFERED RELATED TO THAT SECTION. THE PARTIES AGREE, OR AT LEAST THE STATE DOESN'T CONTEST, THE WELL-ESTABLISHED LEGAL PRINCIPLE THAT LEGAL OPINION TESTIMONY IS INADMISSIBLE WHEN OFFERED BY EITHER LAY OR EXPERT WITNESSES.

INSTEAD, TO SAY THE OPINIONS THAT THE UNITED STATES SEEKS TO EXCLUDE FROM SECTION ONE OF DR. WILEY'S REPORT ARE NOT LEGAL OPINION TESTIMONY, OR IF THEY ARE, THEY ARE NONETHELESS

PERMISSIBLE. AND THIS FLATLY CONTRADICTS BOTH DR. WILEY'S OWN ADMISSIONS AND THE PLAIN LANGUAGE FROM THE REPORT.

FIRST, TO BEST UNDERSTAND WHAT SECTION ONE WAS INTENDED TO BE, IT'S BEST TO LOOK TO DR. WILEY'S OWN UNDERSTANDING OF HIS REPORT. TIME AND TIME AGAIN, WHEN DR. WILEY DESCRIBES HIS ANALYSIS IN SECTION ONE OF HIS REPORT, HE CONFIRMED HE INTENDED THE SECTION TO BE SUBSTANTIVELY HIS LEGAL ANALYSIS.

SECTION ONE OF DR. WILEY'S REPORT IS, AS HE AFFIRMED IN HIS DEPOSITION, QUOTE, AN ANALYSIS AS TO HOW THE REQUIREMENTS OF THE ADA AND I.D.E.A. SHOULD BE UNDERSTOOD. THAT ANALYSIS OFFERS NOTHING THAT COUNSEL FOR THE STATE COULD NOT ARGUE IN LEGAL BRIEFING AND APPLICABLE CASE LAW MAKES CLEAR IS THE KIND OF TESTIMONY THAT IS PROPERLY EXCLUDED.

INDEED, IN SUMMARIZING SECTION ONE OF HIS REPORT, ON PAGE THREE OF THE REPORT, DR. WILEY OFFERS HIS FRAMEWORK FOR HOW ONE, PRESUMABLY THE COURT, SHOULD DETERMINE WHAT THE PHRASE UNNECESSARILY SEGREGATED MEANS, QUOTE, UNDER THE ADA. IN THAT SAME SUMMARY, DR. WILEY SUGGESTS THAT, UNDER HIS ANALYSIS, THE UNITED STATES' ASSERTIONS OF UNNECESSARY SEGREGATION OF STUDENTS ARE UNSUBSTANTIATED BECAUSE ITS EXPERTS, QUOTE, DO NOT CONSIDER I.D.E.A.'S PROCESSES AND THEIR EFFECT ON DECISIONS RELATED TO A CHILD'S PLACEMENT.

IN OTHER WORDS, ACCORDING TO DR. WILEY, IN SECTION ONE OF HIS REPORT, HE OPINES ON THE LEGAL RAMIFICATIONS OF

UNITED STATES' EXPERTS NOT WEIGHING THE I.D.E.A. IN THE WAY THAT HE THINKS THEY SHOULD. WHEN READ IN THIS CONTEXT THAT DR. WILEY PROVIDED, SECTION ONE IS INDISPUTABLY LEGAL OPINION TESTIMONY. I'LL HIGHLIGHT A FEW EXAMPLES. ON PAGE EIGHT AND NINE, DR. WILEY OFFERS HIS STATUTORY INTERPRETATION OF THE ADA-RELATED TERMS PARTICIPATION IN, BENEFITING FROM, AND EXCLUSION AS APPLIED TO EDUCATION.

THEN, AS NOTED IN BRIEFING, NOT ONLY IS THAT LEGAL OPINION TESTIMONY, BUT DR. WILEY'S NARROW CONSTRUCTION OF TITLE II IS WRONG IN LIGHT OF ESTABLISHED CASE LAW. THE REST OF SECTION ONE CONSISTS OF DR. WILEY'S INTERPRETATION OF THE REQUIREMENTS OF THE I.D.E.A., HIS CRITICISMS OF THE UNITED STATES' LEGAL POSITION AS HE UNDERSTANDS IT, HIS OPINION ON THE LEGAL IMPLICATIONS OF THE GNETS PROGRAM UNDER THE I.D.E.A., AND HIS CRITICISMS OF WHAT HE TERMS THE FULL INCLUSION MOVEMENT.

EACH PORTION OF THIS SECTION CONVEYS OR RELIES ON DR. WILEY'S LEGAL OPINIONS AND COULD JUST AS EASILY AND MORE APPROPRIATELY BE FOUND IN THE LEGAL ARGUMENTS SECTION OF THE BRIEF BY THE STATE. THE STATE'S POST-HOC JUSTIFICATIONS FOR SECTION ONE ARE BOTH CONTRADICTED BY DR. WILEY AND ARE SIMILARLY UNSUPPORTABLE.

SO, FOR EXAMPLE, SECTION ONE OF DR. WILEY'S REPORT IS NOT IN RESPONSE TO LEGAL ARGUMENTS MADE BY UNITED STATES' EXPERTS. THE STATE CITES NOTHING IN ITS BRIEF TO SUPPORT THAT ASSERTION. AND THAT'S BECAUSE THERE IS NOTHING THERE.

DR. PUTNAM MAKES ONE LONE REFERENCE TO THE I.D.E.A. IN HIS REPORT. IT'S IN A FOOTNOTE ON PAGE 33. DR. MCCART DOESN'T DIRECTLY REFERENCE THE I.D.E.A. AT ALL, BUT SHOWING ITS INDIRECT REFERENCE SUCH AS WHERE SHE DISCUSSES THE IEP PROCESS.

NOW, ONCE AGAIN, THE MOST COMPELLING EVIDENCE OF HIS INTENT IS WHAT DR. WILEY WRITES. DR. WILEY STATED IN HIS REPORT WAS WRITTEN IN RESPONSE TO EIGHT STATEMENTS MADE BY THE UNITED STATES' EXPERTS. THOSE EIGHT STATEMENTS ARE IDENTIFIED ON PAGES ONE AND TWO OF HIS REPORT. AND NONE OF THESE STATEMENTS DISCUSS EITHER THE I.D.E.A. OR THE ADA.

ULTIMATELY, THE STATE'S ARGUMENTS IN DEFENSE OF SECTION ONE OF DR. WILEY'S BRIEF DO NOT PASS MUSTER. INSTEAD, THE COURT SHOULD LOOK TO THE PLAIN TEXT IN THAT SECTION OF THE REPORT IN DR. WILEY'S OWN WORDS TO CONCLUDE THAT SECTION ONE OF THE REBUTTAL REPORT IS INADMISSIBLE LEGAL OPINION TESTIMONY.

SHIFTING NOW TO THE SECOND HALF OF UNITED STATES' MOTION, THE BASIS FOR THE UNITED STATES SEEKING A RULING PREVENTING DR. WILEY FROM OPINING ON THE GNETS PROGRAM IS SUBSTANTIVELY UNCONTESTED. AS THE STATE WROTE IN ITS BRIEF, QUOTE, DR. WILEY DID NOT CONDUCT AN EVALUATION OF THE SERVICES PROVIDED THROUGH THE GNETS PROGRAM.

BRIEF AT 14, QUOTE, DOJ SEEKS TO EXCLUDE TESTIMONY THAT THE STATE AND DR. WILEY AGREE HE WAS NOT ENGAGED TO TESTIFY ABOUT.

BRIEF AT 15, QUOTE -- AND THIS IS REFERRING TO DR.

WILEY -- HIS TESTIMONY WAS NOT ON GNETS. IT WAS NOT ON GEORGIA SPECIFICALLY.

BRIEF AT 15, QUOTE, DR. MCCART WAS HIRED TO OFFER EXPERT TESTIMONY ON THE GNETS PROGRAM. DR. WILEY WAS NOT.

BRIEF AT 17, NOTE TEN. NOT ONLY HAS THE STATE CONCEDED THAT DR. WILEY DID NOT PERFORM THE TYPE OF ANALYSIS NEEDED TO PROVIDE EXPERT TESTIMONY ON THE GNETS PROGRAM, BUT THE STATE EVEN ACKNOWLEDGES THAT THE SCOPE OF DR. WILEY'S WORK DIFFERED IN KIND FROM THAT OF THE UNITED STATES' EXPERTS.

WHEN STRIPPED AWAY FROM EXTRANEOUS ARGUMENT, THERE'S NO DISPUTE BETWEEN THE PARTIES AS TO THE SECOND CATEGORY OF TESTIMONY UNITED STATES SEEKS TO EXCLUDE. BOTH PARTIES AGREE DR. WILEY DID NOT EVALUATE AND WAS NOT RETAINED TO REVIEW THE GNETS PROGRAM. AND, AS A RESULT, HE SHOULD BE BARRED FROM OFFERING ANY SUCH TESTIMONY AT TRIAL.

FOR THESE REASONS, WE ASK THE COURT GRANT THE UNITED STATES' MOTION.

I RESERVE THE BALANCE OF MY TIME.

THE COURT: THANK YOU.

MR. GILLESPIE: THANK YOU.

MS. JOHNSON: GOOD AFTERNOON, JUDGE.

THE COURT: GOOD AFTERNOON.

MS. JOHNSON: MELANIE JOHNSON ON BEHALF OF THE STATE OF GEORGIA.

IT IS HARD TO UNDERSTAND WHY DOJ BROUGHT THE WILEY

MOTION. THE STATE SAID THIS IN ITS OPPOSITION BRIEF. AND AFTER A COMPLETE BRIEFING ON THE TOPIC AND ORAL ARGUMENT TODAY, THAT STILL REMAINS TRUE. AND THIS IS BECAUSE DOJ'S POSITION WITH RESPECT TO DR. WILEY IS CONFOUNDING.

ON THE ONE HAND, THE MOTION INDICATES THAT DOJ HAS A FUNDAMENTAL MISUNDERSTANDING OF WHAT DR. WILEY'S ROLE IS IN THIS CASE. WHILE ON THE OTHER HAND, THEY DO READILY ADMIT THAT, LIKE DR. PUTNAM, HE WAS NOT PROFFERED TO PROVIDE TESTIMONY ON GNETS. THIS CONCESSION BEGS THE QUESTION, WHAT WAS THE POINT OF THIS MOTION.

BUT BEFORE DIGGING INTO DOJ'S MOTION AND WHAT IT CHALLENGES, IT'S JUST AS IMPORTANT TO EMPHASIZE WHAT IS NOT CHALLENGED HERE, AND THAT IS DR. WILEY'S ACTUAL OPINIONS IN THIS CASE. AND THERE ARE FIVE OF THEM.

FIRST, THAT THE I.D.E.A. SHOULD BE CONSIDERED ALONGSIDE THAT OF THE ADA, AND DOJ'S EXPERTS' FAILURE TO DO SO UNDERMINES THEIR OPINIONS IN THIS CASE.

SECOND, THAT THE VAST MAJORITY OF STUDENTS, OR THE IDEA THAT THE VAST MAJORITY OF STUDENTS WITH BEHAVIOR-RELATED DISABILITIES CAN BE TAUGHT IN GEN ED IS A GENERALIZATION AND UNDERESTIMATES THE DIVERSITY AND COMPLEXITY OF THE EDUCATIONAL DIFFICULTIES EXPERIENCED BY THESE STUDENTS.

THIRD, RESEARCH DOES NOT SHOW THAT PLACEMENT IN GEN ED IS CATEGORICALLY BETTER THAN PLACEMENT IN SPECIALIZED SETTINGS.

FOURTH, LIMITATIONS OF EDUCATIONAL SERVICES AND SUPPORTS THAT ARE INTENDED TO MAKE GEN ED APPROPRIATE AND EFFECTIVE FOR STUDENTS WITH BEHAVIOR-RELATED DISABILITIES CASTS DOUBT ON WHETHER THOSE STUDENTS CAN SUCCEED IN GEN ED.

AND, LASTLY, SEPARATE PLACEMENTS CAN BE MORE APPROPRIATE AND EFFECTIVE THAN GENERAL EDUCATION. INSTEAD, SPECIFICALLY, DOJ SEEKS TO EXCLUDE TWO CATEGORIES: FIRST, SECTION ONE OF DR. WILEY'S REPORT BECAUSE IT IS PURPORTEDLY LEGAL OPINION. AND, SECOND, TESTIMONY THAT IS NOT IN THE REPORT AND DOES NOT EXIST.

I WILL FIRST DISCUSS THE FIRST CATEGORY, WHICH -- THE FIRST CATEGORY THAT THEY ARGUE IT SHOULD BE EXCLUDED BECAUSE IT'S LEGAL OPINION. IN SECTION ONE, DR. WILEY PROVIDES CONTEXT OR A ROADMAP, IF YOU WILL, FOR THE REST OF HIS REPORT. HE TALKS ABOUT THE ADA AND HE TALKS ABOUT THE I.D.E.A. AND HE TALKS ABOUT COMMONLY-USED TERMS SUCH AS LRE, LEAST RESTRICTIVE ENVIRONMENT, AND THE CAP, OR THE CONTINUUM OF ALTERNATIVE PLACEMENTS, IN ORDER TO INTRODUCE THESE TERMS AND GIVE A PRACTITIONER'S PERSPECTIVE ON THE INTERRELATEDNESS OF THESE LAWS AND LEGAL PRINCIPLES IN THE REAL WORLD.

SECTION ONE IS SIMPLY NOT LEGAL OPINION. AND DOJ HASN'T IDENTIFIED ANY AUTHORITY THAT SAYS AN EXPERT CAN'T TALK ABOUT THE LAW, NOR COULD THEY. THEIR OWN EXPERTS TALK ABOUT LAW. IT'S THAT YOU CAN'T PROVIDE A LEGAL OPINION OR INTERPRET A STATUTE OR OFFER AN OPINION ON ULTIMATE ISSUE OF LAW, SUCH

AS, HAS THE ADA BEEN VIOLATED. DR. WILEY DOES NONE OF THESE THINGS.

AGAIN, WE'RE TALKING ABOUT THE ADA IN THE EDUCATION SETTING. AND SO DR. WILEY'S PROVIDING A PRACTITIONER'S PERSPECTIVE FROM THAT EDUCATION-SETTING STANDPOINT. AND THIS TYPE OF OVERVIEW SIMPLY DOES NOT ENCROACH ON THE COURT'S DOMAIN AS THE SOURCE OF THE LAW.

ONE THING THAT DOJ DOES REPEATEDLY IS BRING UP ONE LINE FROM DR. WILEY'S DEPOSITION ABOUT HIS SORT OF FRAMING OF WHAT HE SAID IN HIS REPORT. AND HE SAID THAT A COUPLE OF TIMES IN HIS REPORT AND THEY BROUGHT IT UP. THEY SAID IT A COUPLE OF TIMES IN THEIR MOTION. AND THEY BROUGHT IT UP TODAY.

AND I THINK IT'S IMPORTANT TO REMEMBER THAT THERE'S BEEN NO AUTHORITY OFFERED THAT WHAT AN EXPERT SAYS IN THEIR DEPOSITION CONTROLS OVER HOW THEIR REPORT SHOULD BE CONSIDERED AND WHETHER IT'S LEGAL OPINION OR NOT. AND, ALSO, IT WAS DR. MCCART THAT OPINED ON THE MEANING OF UNNECESSARY SEGREGATION AND WHETHER THAT WAS HAPPENING IN THIS CASE. AND DR. WILEY SIMPLY RESPONDED TO THAT.

SO IF -- IF DR. MCCART CAN OPINE ON UNNECESSARY SEGREGATION, THEN DR. WILEY CAN, AS WELL, AS A REBUTTAL EXPERT.

BUT EVEN IF THE COURT WERE TO FIND THAT SOME OF SECTION ONE CONTAINS LEGAL OPINION -- AND IT DOESN'T -- BUT THIS IS NOT GROUNDS TO STRIKE ALL OF SECTION ONE IN ITS ENTIRETY. AND THAT IS BECAUSE THE VAST MAJORITY OF SECTION ONE

IS UNAMBIGUOUSLY OBJECTIVELY NOT LEGAL OPINION.

FOR EXAMPLE, LET'S TALK ABOUT TABLE TWO IN SECTION ONE, WHICH I SUSPECT, READING BETWEEN THE LINES, MAY BE PART OF THE REASON THAT DOJ REALLY WANTS ALL OF SECTION ONE STRICKEN. TABLE TWO CONTAINS GOVERNMENT DATA SOURCED FROM DOJ'S SISTER AGENCY, THE UNITED STATES DEPARTMENT OF EDUCATION. THE DATA SHOWS THAT GEORGIA IS ACTUALLY ABOVE THE NATIONAL AVERAGE IN ITS EDUCATION OF STUDENTS WITH EBD.

THE NATIONAL PERCENTAGE OF STUDENTS WITH EBD TAUGHT 80 PERCENT OR MORE OF THE TIME IN A GENERAL EDUCATION SETTING IS 50.2 PERCENT NATIONWIDE. IN GEORGIA, IT'S HIGHER, AT 52 PERCENT. AND THE NATIONAL PERCENTAGE OF STUDENTS WITH EBD TAUGHT IN A SEPARATE SCHOOL NATIONWIDE IS 12.3 PERCENT. IN GEORGIA IT'S LOWER AT JUST 9.9 PERCENT.

DATA IS NOT AN OPINION, AND IT'S CERTAINLY NOT A LEGAL OPINION. THIS DATA IS BAD FOR DOJ. AND THEY UNDERSTANDABLY WANT IT STRICKEN FROM DR. WILEY'S REPORT. BUT THEY CAN'T BLATANTLY MISCHARACTERIZE DATA AS IMPROPER LEGAL OPINION IN ORDER TO ACHIEVE THEIR DESIRED OUTCOME.

I'LL MOVE ON NOW TO THE SECOND CATEGORY, WHICH IS TESTIMONY ON GNETS. AND AS I NOTED PREVIOUSLY, DOJ'S POSITION WITH RESPECT TO THE SECOND CATEGORY OF THINGS THEY WANT EXCLUDED IS PARTICULARLY CONFUSING, GIVEN THAT THEY READILY ADMIT DR. WILEY WAS NOT OFFERED TO PROVIDE TESTIMONY ON GNETS AND THAT HE HAS NOT DONE SO IN THIS CASE.

MAYBE IF DOJ COULD IDENTIFY A SPECIFIC PART OF THE REPORT THAT THEY WANT EXCLUDED ON THESE GROUNDS, THE REQUEST COULD BE BETTER UNDERSTOOD, BUT THEY HAVEN'T IDENTIFIED ANY SUCH PORTION OF THEIR REPORT. AND THEIR REQUEST IS CONFUSING, PARTICULARLY WHEN KEEPING IN MIND THAT AN EXPERT CAN'T OFFER NEW OPINION TESTIMONY AT TRIAL THAT WAS NOT PREVIOUSLY DISCLOSED IN THEIR EXPERT REPORT. AND THAT'S FEDERAL RULE OF CIVIL PROCEDURE 26(A)(2)(B).

SO DR. WILEY HASN'T OFFERED AN OPINION ON GNETS IN HIS REPORT. THE STATE HASN'T DISCLOSED DR. WILEY AS AN EXPERT THAT WILL OFFER SUCH AN OPINION. AND FEDERAL RULE 26 PROHIBITS DR. WILEY FROM OFFERING NEW OPINION TESTIMONY AT TRIAL NOT IN HIS REPORT.

WHEN TAKING ALL OF THIS INTO CONSIDERATION, THE MOTION IS UNNECESSARY AND IT'S MERITLESS. IT'S ESSENTIALLY ASKING THE COURT TO AFFIRMATIVELY AND UNNECESSARILY STATE IN AN ORDER WHAT IS ALREADY CLEAR: DR. WILEY IS NOT PROVIDING AND WILL NOT PROVIDE TESTIMONY ON GNETS AT TRIAL.

MOVING ON TO SOME OF DOJ'S OTHER ARGUMENTS, MUCH OF DOJ'S ARGUMENTS IN ITS MOTION AND TODAY CONSISTS OF WHAT DR. WILEY DID NOT DO. BUT NONE OF THIS MATTERS, BECAUSE THESE ITEMS OR TASKS WERE NOT NECESSARY FOR DR. WILEY TO RENDER THE OPINION THAT HE DID PROVIDE IN THIS CASE.

FOR EXAMPLE, IN OUR MOTION, DOJ NOTES THAT DR. WILEY DID NOT REVIEW STUDENT IEP'S FOR APPROPRIATENESS AND FIDELITY

OF IMPLEMENTATION. THIS DOESN'T MATTER, BECAUSE DR. WILEY, AS A REBUTTAL WITNESS AND FOR THE PURPOSES FOR WHICH HE WAS ACTUALLY ENGAGED, DID NOT NEED TO REVIEW IEP'S TO PROVIDE THE OPINION THAT HE DID PROVIDE. HE ISN'T AN AFFIRMATIVE EXPERT OFFERING OPINION ON THE APPROPRIATENESS OF STUDENTS IN GNETS' IEP'S. AND NOTABLY, THOUGH DOJ LISTS THINGS THAT DR. WILEY DID NOT DO, THEY DO NOT ARGUE THAT HIS FAILURE TO DO THESE THINGS IS FATAL TO HIS REPORT.

AND IT'S WORTH NOTING THAT DOJ'S OWN EXPERTS DID NOT DO THIS, EITHER. YOU WILL HEAR DOJ TOUT THAT DR. MCCART REVIEWED SOMEWHERE AROUND 65 IEP'S. BUT WHEN YOU CONSIDER THERE ARE APPROXIMATELY 3,000 STUDENTS IN GNETS, THAT'S JUST TWO PERCENT. AND DR. PUTNAM LOOKED AT SEVEN. AND THESE ARE THE AFFIRMATIVE EXPERTS WHO ARE PROVIDING TESTIMONY ON GNETS.

LASTLY, REGARDING THE STATE'S ARGUMENTS ON THE HYPOTHETICAL STUDENT, THE STATE'S POINT IS THIS: NO ONE IN THIS CASE, NOT DR. WILEY, NOT DR. MCCART, NOT DR. PUTNAM, HAS LOOKED AT EACH OF THE 3,000 INDIVIDUAL STUDENTS IN THE GNETS PROGRAM, IDENTIFIED THEM, AND MADE A DETERMINATION ABOUT WHAT THEIR NEEDS ARE. SO WE ARE TALKING IN GENERALITIES, OR, IN OTHER WORDS, THEORETICALLY, BECAUSE WE ARE TALKING ABOUT STUDENTS WHO ARE UNIDENTIFIED AND WHOSE NEEDS ARE NOT ACTUALLY KNOWN.

SO THIS CASE HAS ALWAYS BEEN ABOUT HYPOTHETICAL STUDENTS. AND IF THE DOJ WANTS OR AGREES THAT A MORE

INDIVIDUALIZED ANALYSIS IS REQUIRED, THEN DR. WILEY IS OUT. BUT SO ARE DR. PUTNAM AND DR. MCCART.

IT IS DOJ WHO HAS OFFERED AFFIRMATIVE EXPERTS SEEKING TO PROVIDE EXPERT OPINION ON INDIVIDUAL NEEDS USING WHAT ARE REALLY GENERALITIES. AND YOU'VE ALREADY HEARD TODAY WHY THIS IS A PROBLEMATIC APPROACH.

IN CONCLUSION, YOUR HONOR, WE ASK YOU TO DENY DOJ'S MOTION. DR. WILEY IS NOT ARGUING A LEGAL OPINION. AND EVEN IF HE WERE IS NOT GROUNDS TO EXCLUDE ALL OF SECTION ONE OF HIS REPORT.

SECOND, DR. WILEY IS NOT AN AFFIRMATIVE EXPERT OFFERING OPINION TESTIMONY ON GNETS IN THIS CASE. THAT IS NOT GROUNDS TO GRANT A MOTION TO PROHIBIT TESTIMONY THAT IS NOT IN THE REPORT AND DOES NOT EXIST.

THANK YOU.

THE COURT: THANK YOU.

MR. GILLESPIE: YOUR HONOR, I'M JUST GOING TO TAKE A COUPLE MINUTES TO RESPOND TO A COUPLE OF DISCRETE POINTS RAISED BY THE STATE.

EARLY ON, THE STATE CHARACTERIZED SECTION ONE OF DR. WILEY'S REPORT AS SETTING FORTH HOW THE I.D.E.A. SHOULD BE CONSIDERED ALONG WITH THE ADA. AND THAT IS PRECISELY THE ISSUE HERE, IS THAT DR. WILEY IN SECTION ONE DOES PURPORT TO SET FORTH HOW THE I.D.E.A. AND THE ADA SHOULD INTERRELATE WITH ONE ANOTHER. BUT THAT IS A LEGAL QUESTION. IT'S A LEGAL QUESTION

THAT THE STATE HAS RAISED IN BRIEFING THAT WE HAVE TALKED ABOUT HERE TODAY AND IS NOT SOMETHING THAT'S APPROPRIATE FOR A SPECIAL EDUCATION EXPERT TO OPINE ON AT TRIAL.

THE STATE ALSO TRIED TO DRAW A COMPARISON BETWEEN DR. MCCART'S OPINIONS ON THE UNNECESSARY SEGREGATION AND EQUATING THOSE WITH SECTION ONE OF DR. WILEY'S REPORT. I THINK THERE'S A REALLY IMPORTANT DISTINCTION HERE TO DRAW.

DR. MCCART, AS I REFERENCED EARLIER TODAY, GAVE HER OPINIONS ON UNNECESSARY SEGREGATION AFTER A VERY FACTUALLY-INTENSIVE REVIEW OF THE GNETS PROGRAM. DR. WILEY'S OPINIONS ON UNNECESSARY SEGREGATION, ON THE OTHER HAND, ARE COMPLETELY DIVORCED FROM ANY FACTS RELATED TO THE GNETS PROGRAM. AND THAT'S PART OF THE ISSUE. HIS OPINIONS ARE ABOUT, ON HOW THE COURT SHOULD CONSTRUE CERTAIN LAWS TO RELATE WITH ONE ANOTHER AND HOW IT SHOULD BE INTERPRETED IN THE CONTEXT OF EDUCATION.

THE STATE ALSO RAISED QUESTION ABOUT WHY THE UNITED STATES MOVED TO EXCLUDE DR. WILEY'S TESTIMONY AS IT RELATES TO THE GNETS PROGRAM. AND THERE ARE A COUPLE OF POINTS THAT I WANT TO RAISE.

NOW, DESPITE THE FACT THAT DR. WILEY DID NOT EVALUATE THE GNETS PROGRAM, HIS REPORT DOES MAKE PERIODIC CONCLUSORY STATEMENTS ABOUT IT. FOR EXAMPLE, ON PAGE TEN, HE DISCUSSES THAT, IN HIS VIEW, PLACEMENT OF GNETS IS BASED ON THE NEEDS OF THE INDIVIDUAL STUDENTS.

ON PAGE 12, HE SAYS THAT, PRIOR TO PLACEMENT IN GNETS, IEP TEAMS CONSIDER AND DOCUMENT SERVICES AND SUPPORTS WERE PROVIDED IN LESS RESTRICTIVE ENVIRONMENTS.

ON PAGE 37, HE PARAPHRASES INDIVIDUALS THAT HE SPOKE WITH IN SAYING THAT PARENTS ARE RELIEVED TO KNOW WHEN THEIR STUDENTS ARE PLACED IN GNETS. GNETS STAFF ARE TRAINED AND FOCUSED ON SUPPORTING STUDENTS WITH BEHAVIOR-RELATED DISABILITIES. THIS HE SAYS HE LEARNED AFTER SPEAKING WITH SEVERAL GNETS PROGRAM DIRECTORS.

THESE TYPES OF OPINIONS ARE UNRELIABLE AND UNHELPFUL, AS IS THE STATE'S OVEREXTENSION OF TABLE TWO, TRYING TO APPLY DR. WILEY'S INCLUSION OF THAT TABLE TO THE GNETS PROGRAM IN THE STATE OF GEORGIA.

IN THE END, YOUR HONOR, WE THINK THAT IT'S STRAIGHTFORWARD, THAT SECTION ONE IS AS DR. WILEY CLAIMS IT TO BE, HIS ANALYSIS AS TO HOW THE REQUIREMENTS OF THE ADA AND I.D.E.A. SHOULD BE UNDERSTOOD, AND THAT THE SECOND GROUNDS FOR UNITED STATES' MOTION ARE UNCONTESTED AND, THEREFORE, THE MOTION SHOULD BE GRANTED.

THANK YOU.

THE COURT: ALL RIGHT. AND BEFORE YOU STEP AWAY, BECAUSE I HAVE NOT LOOKED AT THE --

MR. GILLESPIE: YES, YOUR HONOR.

THE COURT: WELL, LET ME ASK YOU: IS IT CLEARLY MARKED WHAT PORTIONS OF HIS OPINION YOU SEEK TO EXCLUDE? IS IT

SECTION ONE IN ITS ENTIRETY, OR ARE THERE CERTAIN PARTS? I MISSED THAT, BECAUSE I THINK THE COUNTERARGUMENT WAS THAT, YOU KNOW, ALL OF IT SHOULD BE IN. BUT EVEN IF NOT, ONLY A PORTION SHOULD COME OUT UNDER YOUR ARGUMENT.

WHEN I GO LOOK AT IT, WILL IT BE CLEAR TO ME WHICH PORTIONS YOU ARE SEEKING TO ELIMINATE OUT, SINCE YOU CAN SEE THAT IT DOESN'T APPLY TO THE ENTIRE?

MR. GILLESPIE: YES, YOUR HONOR. WE'RE SEEKING TO EXCLUDE THE ENTIRETY OF JUST SECTION ONE OF HIS REPORT. THERE ARE FIVE. FOR THE FIRST PART OF OUR -- OUR MOTION WE'RE JUST FOCUSED ON SECTION ONE. AND IT'S ARGUED THAT, EVEN THOUGH THERE ARE PARTS OF IT THAT ARE MORE OR LESS DIRECTLY LEGAL OPINION, THE PURPOSE OF THAT SECTION AS SET FORTH BY DR. WILEY MAKES CLEAR THAT IT'S ALL INTERCONNECTED. IT IS HIM TRYING TO SET FORTH A FRAMEWORK FOR HOW THE COURT SHOULD UNDERSTAND THE I.D.E.A. AND ADA.

THE COURT: SO SECTION ONE IN ITS ENTIRETY.

MR. GILLESPIE: YES, YOUR HONOR.

THE COURT: OKAY. ALL RIGHT. THANK YOU SO MUCH.

MR. GILLESPIE: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT.

YES.

MS. COHEN: YOUR HONOR, I DID MENTION IN MY ARGUMENT TWO CASES THAT WE HAVE NOT FURNISHED THE COURT WITH. WOULD YOU LIKE ME TO HAND THEM UP? I ALSO HAVE COPIES FOR OPPOSING

COUNSEL.

THE COURT: THAT'S FINE. I DON'T THINK I'VE GOTTEN HARD COPIES ON ANY OTHER CASES, BUT IF YOU HAVE THEM PREPARED, THAT'S FINE.

THANK YOU.

OKAY. IS THERE ANYTHING ELSE, AS SHE DOES THAT, FROM ANYONE ELSE?

ALL RIGHT. I WILL TAKE THIS UNDER ADVISEMENT. THANK YOU.

I WILL TELL YOU ALL THAT NORMALLY -- AND I THINK THOSE OF YOU WHO HAVE HAD CASES BEFORE ME WOULD PROBABLY KNOW THIS ALREADY -- NORMALLY IN PREPARATION FOR A HEARING, I KIND OF LOOK AT EVERYTHING BEFORE THE HEARING. THIS CASE, TO BE QUITE HONEST -- AND I'M TELLING ON MYSELF -- IS SO MASSIVE, I THOUGHT I'D DO IT DIFFERENTLY. AND SO I DID NOT LOOK AT ALL OF THE DEPOSITIONS AND EVERYTHING AS CLOSELY AS I NORMALLY WOULD BEFOREHAND. I KIND OF JUST REVIEWED IT IN SUMMARY FORM.

I WILL TELL YOU THAT, BASED ON WHAT I'VE HEARD TODAY -- AND THESE ARE JUST INCLINATIONS JUST TO GIVE YOU SOME GUIDANCE; THESE ARE NOT PRONOUNCEMENTS OF ANY RULINGS -- THE ONLY -- WITH RESPECT TO THE FOUR WITNESSES WE TALKED ABOUT, THE ONLY ONE I'M CONCERNED ABOUT, BASED ON JUST WHAT I'VE HEARD HERE -- AND EVEN THAT I'LL LOOK AT MORE CLOSELY -- IS DANTE MCKAY FOR VARIOUS REASONS. THE OTHER ONES I DIDN'T HEAR A LOT THAT WOULD CONCERN ME. BUT I'M STILL GOING TO GO LOOK AT

EVERYTHING IN ITS ENTIRETY AND CONSIDER THE ARGUMENTS THAT WERE MADE.

AND THE MOTION FOR SUMMARY JUDGMENT AND MOTION FOR PARTIAL SUMMARY JUDGMENT REMAIN UNDER ADVISEMENT AS WELL.

IS THERE ANYTHING ELSE AT THIS TIME BEFORE WE DEPART, ON BEHALF OF THE PLAINTIFF?

MS. WOMACK: NO, YOUR HONOR.

THE COURT: ON BEHALF OF THE DEFENDANT.

MR. BELINFANTE: NO, YOUR HONOR.

THE COURT: ALL RIGHT. THE FINAL THING I WANT TO SAY -- GOOD AFTERNOON, SIR -- IS, I KNOW THERE WAS SOME CONFUSION GOING ON OVER THERE. AND I ASKED MY CRD TO SEE WHAT IT WAS. APPARENTLY DIFFERENT JUDGES HAVE DIFFERENT RULES ABOUT PHONES BEING USED IN THE COURTROOM. I DON'T HAVE THAT. AND SO I'VE NOT DIRECTED ANYONE TO SAY ANYTHING TO ANYONE. I WANT THAT KNOWN, AS LONG AS PHONES ARE NOT BEING USED TO RECORD OR TAKE PICTURES, THINGS AGAINST OUR RULES, I DON'T HAVE AN ISSUE WITH THAT.

SO MY APOLOGIES IF ANYONE WAS -- I WON'T SAY -- I DON'T WANT TO SAY ANYTHING AGAINST OUR CSO'S, BECAUSE I APPRECIATE ALL OF THE WORK THAT YOU ALL DO IN ENFORCING ALL OF THE RULES. BUT, AGAIN, DIFFERENT JUDGES HAVE DIFFERENT RULES, AND I'VE NEVER COMMUNICATED ANY RULE THAT I MIGHT HAVE REGARDING PHONE USAGE IN THE COURTROOM, UNDERSTANDING THAT THOSE BASIC RULES OF RECORDING AND TAKING PICTURES IS NOT

PERMISSIBLE IN THE ENTIRE COURTHOUSE.

ALL RIGHT. IF THERE IS NOTHING ELSE AT THIS TIME, WE ARE ADJOURNED. THANK YOU.

THE COURTROOM SECURITY OFFICER: ALL RISE. COURT STANDS IN RECESS.

(PROCEEDINGS CONCLUDED AT 3:39 P.M.)

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

CERTIFICATE OF REPORTER

I DO HEREBY CERTIFY THAT THE FOREGOING PAGES ARE A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS TAKEN DOWN BY ME IN THE CASE AFORESAID.

THIS, THE 10TH DAY OF MAY, 2024.

/S/ ELIZABETH G. COHN

ELIZABETH G. COHN, RMR, CRR
OFFICIAL COURT REPORTER